No. 2235.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

NORTHERN DISTRICT OF CALIFORNIA.

STANDARD PORTLAND CEMENT CORPORATION, a Corporation,

Plaintiff in Error,

vs.

EVANS, COLEMAN & EVANS, et al.,

Defendants in Error.

Brief for Plaintiff in Error.

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PRESS OF THE JAMES H. BARRY CO.

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BRIEF FOR PLAINTIFF IN ERROR.

GENERAL STATEMENT OF THE CASE.

This cause comes up from the Circuit Court of the United States, Ninth Circuit, Northern District of California. Originally, a law action was brought upon certain promissory notes claimed to have been executed by the Standard Portland Cement Corporation: to this action certain equitable defenses were

interposed; but a more enlarged consideration of the situation revealed the inhibition placed by Federal practice upon the interposition of equitable defenses to actions at law (*Levy* vs. *Matthews,* 145 Fed., 152). In line with the hint given by the Supreme Court (*Burns* vs. *Scott,* 117 U. S., 582), that the relief to be sought by the defendants in the action at law would be an injunction to stay the suit at law upon the notes pending the determination of the equitable defenses, the equity suit was commenced: but by arrangement with counsel, the whole controversy was litigated at once, the parties throughout being the same, and being the original parties. Stated in the most general terms, the claim of the law plaintiffs and equity defendants rests upon these alleged corporate notes: the claims of the law defendants and the equity complainants rests upon several propositions; such as the antagonism of the notes to settled public policy, the absence of consideration for the notes, the failure of delivery of any bonds or stocks to the Standard Portland Cement Corporation, the inequity of notes which are the progeny of corporate fraud and breach of trust, and the participation by the equity defendants in such corporate fraud and breach of trust; and the prayer of the Standard Portland Cement Corporation was that it be protected from the participated breach of trust of which it was a victim.

What are the general features of this controversy?

A. Incorporation of the Cement Companies.

Standard Portland Cement Co.:

Incorporated, 1902, Jan. 27.
What Law: California.
Place of business: San Francisco.
Occupation: Manufacture and sale of Portland Cement.
Principal Officers: Dingee and Bachman.

Santa Cruz Portland Cement Co.:

Incorporated, 1905, June 2.
What Law: California.
Place of Business: San Francisco.
Occupation: Manufacture and sale of Portland Cement.
Principal Officers: Dingee and Bachman.

Standard Portland Cement Corporation:

Incorporated, 1907, Feb. 25.
What Law: California.
Place of Business: San Francisco.
Occupation: Manufacture and sale of Portland Cement.
Principal Officers: Dingee and Bachman.

And these Companies were dominated by Dingee: his was the controlling personality.

Howard concedes that Dingee did not surrender

this control until the latter part of 1908. Evans makes no attempt to dispute Dingee's control (Record, Vol. I, p. 135); and no man of the world looking over the testimony and correspondence in this cause could have any reasonable doubt as to Dingee's "unquestioned" control,—to employ Evans' phraseology.

B. The Sales Agency Companies. These were two.

Originally: *The Western Fuel Co.,* of which Howard was and still is President.

By Assignment: *The Western Building Materials Co.,* of which, also, Howard is President.

The Western Building Materials Co. is a mere offshoot from, or appendage to, the Western Fuel Co., and controlled by the latter, and this is admitted by Howard in his testimony on page 78 of the record.

C. The Relations between the Cement Companies and the Sales Agency Companies.

These relations are exhibited by the sales agency contracts, which are referred to in the record herein, whereby the entire product of the cement companies is controlled by the sales agency companies; and so far reaching was the power and control of the sales agency companies over the disposition of the output of the cement companies, that even if the cement companies should themselves sell any part of their product, still the same commissions must nevertheless be paid to the sales agency companies. These con-

tracts, then, reflect the important position of Howard: they make him the connecting link between the factory and the market,—the conduit through which the manufactured product went out, and through which the accruing revenue came in.

The making of these contracts, and the assignments thereof to the Western Building Materials Company, were negotiated by Dingee and Howard; and these assignments directly contemplate the continuity of Howard as sales agent, the option to terminate arising only upon the cessation of Howard as executive officer of the sales agency company.

And moreover: it was the clear intention of the parties that this sales agency should be exclusive in character. The contracts themselves plainly indicate that: Howard declares such to have been the fact (Record, Vol. I, p. 231); and so, likewise, does Evans (Record, Vol. I, p. 132-3). Not only do the foregoing facts illustrate the commanding position of Howard, but no one understood that better than Dingee himself, who, as the sequel will show, wished, during crises and times of stress, to conciliate Howard; and Howard himself shows that Dingee was anxious to retain him as a selling agent, while Young, on pages 724-725 and 751 of Vol. III of the record, makes it evident that the establishment of a sales agency relation of this kind was valuable to Dingee, that he always admitted it, and that he was anxious to retain Howard and Howard's company as the selling agents.

D. Organization of North Western Portland Cement Company.

Incorporated, 1906, Aug. 27.

What law: California.

Place of business: San Francisco.

Occupation: Manufacture and sale of Portland cement.

Principal Officers: Dingee and Bachman.

The North Western and the Standard were independent and distinct corporations, different sets of stockholders, and without any relations whatever up to May 1908; and the transaction involved in the cause at bar was and is the solitary point of contact between these two corporations throughout their entire corporate history.

E. Relations of Howard and the Flotation of the N. W. Co.

Notwithstanding the affected aloofness of Howard as to this subject matter, it still remains true that his intimate relations to the flotation of the North Western Company, and his complete knowledge of every step in the progress of that Company, cannot be successfully minimized; and not only was he thoroughly familiar with every move that was made, even to the point of instructing Bachman that "you may go on with your incorporation as soon as I wire you tomorrow that deeds have been signed" (Letter of July

8, 1906, Record, Vol. III, p. 780), but he communicated his knowledge to Evans. The intimate relations of Howard to the flotation of the N. W. Co. obtrude themselves everywhere throughout the record. He was interested as sales agent in extending his own business: it was he who originated the move by suggesting to Dingee the establishment of a Puget Sound factory: his interest was so keen that he warned Dingee of the consequences of the establishment of such a factory by others: he was interested because his Western Fuel Company was a bondholder in the Santa Cruz Company: he wanted the sales agency for the Puget Sound factory, and Dingee had promised it to him; and his interest in the project led him into action. He was deputed by Dingee to locate lime deposits, and did so, and acquired the lands with money furnished by Dingee and Bachman (and we all know how long and how hard this uninterested gentleman fought the gas-pipe gang), and the title to these lands subsequently vested in the N. W. Co.: that upon the organization of the N. W. Co., Howard's Western Building Materials Company, in view of the anticipated sales agency, became a bondholder in the N. W. Co., and later Howard became a stockholder therein. These very convincing indicia of interest do not exhibit Howard standing apart in chill indifference to the launching of the N. W. Co.; and unless plain English speech has lost its significance, not only did the original idea of the Puget Sound factory

spring from Howard's brain, but he fostered the development of that idea in every way and through every avenue open to him.

And then, too, consider briefly the revelations of the correspondence: for one cannot do more, at this time, than make a general statement, the details being discussed later. But in general terms we know that Howard was immersed in the project from the beginning: that his activity in the northwest was marked: that he assisted with Evans in the original inspection of the Kendall properties: that he purchased them: that he located 80 acres in his own name: that he fought the ensuing litigation: that the patent was taken in his name: that he dealt with attorneys, and railroad men, and power men, and other men: that he had the Washington agent appointed: that he even bestowed the name of "Devon" upon the place: that as far back as 1906, he was familiar with the financial scheme of the Company: that he looked forward to the sales agency for the enterprise, but thought that jail was a poor place from which to manage a cement business: that he participated in the promotion of the Company as a partner with Dingee and Bachman: that he was to share "alike" (Record, Vol. II, p. 385) with them in the promotion profits: that out of his "allotment" (Id., p. 384) and "share" (Id.), he was to "take care of" Evans (Id.); and that he got his share of $900,000 and did take care of Evans to the tune of $200,000. We find this uninterested gentle-

man speaking of "*our* construction work"; and on July 3rd, 1906, we find him speaking of "*our* factory"; and on October 17th, 1906, we find him speaking of "*our* land." We find him dealing with attorneys: we find him dealing with railroad men: we find him dealing with power men: we find him writing to Dingee about "*our* getting the juice": we find him baptizing the northern site by the name of "Devon": we find him writing to Dingee that "the sooner *we* get a move on, the better"; and we again find him writing to Dingee at New York that "*we* should be up and doing." And indeed, it was conceded not only that Howard suggested the original idea of the N. W. Co. enterprise, and that he was interested therein, but also that his letters show that he was much interested therein.

These, and other facts and circumstances which will be discussed hereafter, illustrate Howard's continued and persistent activity and interest in the launching of the new enterprise: his letters show directly his consciousness that what he was doing was to prepare the way for the new organization: can any reasonable man say that his efforts were not intended to aid and assist the launching and floating of the N. W. Co.? How insincere, then, is the attempt to minimize his activity and interest? What importance, then, can be attached to Howard's extraordinary testimony, that he did not know who organized the North Western Portland Cement Company, or his affectation of doubt

as to its organization in 1906, or his extraordinary statements, that he did not know precisely when the N. W. Co. was organized, and that he never heard of its bond issue in particular. And Evans is even worse. He was thoroughly in touch with the whole situation: he was so notoriously in touch with it, that remote machine manufacturers addressed offers of machinery to him for "your proposed cement works," they noting "that you contemplate the construction of a cement plant at Kendall in the near future," and "that you are about to erect the largest cement plant in the United States"; and we know also that Evans was thoroughly in touch with the whole situation, not only from the correspondence itself, but also from Howard's own testimony. And yet, Evans was actually guilty of this:

"Q. Was Mr. Howard in any way interested in that transaction?
"A. In what way?"

(Note the punctilious straight-forwardness of this reply.)

"Q. In any way whatever.
"A. As a promoter?"

(Note again the engaging and limpid sincerity of the man.)

"Q. Either as a promoter, or an organizer, or

an assistant in any way, in the establishment of that corporation.

"A. I DON'T THINK SO" (Record, Vol. I, p. 128).

F. The Bond Issue of the N. W. Co.

Date of Authorization of Bond Issue: November 3rd, 1906.

Purpose: To establish and equip at Kendall a cement producing plant of the capacity of at least 5,000 barrels per day.

I stop here for a moment to call attention to an interesting passage in the testimony of Mr. Howard, bearing upon this point—a passage which is in line with the minimizing of his interest in the N. W. Co. and in which he would seek to suggest his aloofness from this matter of the bond issue. He was asked:

"Q. What was the purpose of the bond issue of the North Western Company?

"A. Well, I ASSUME that it was for the construction of the plant, but I was not a party to the arrangement or the capitalization scheme of organization; I did not have anything to do with that at all" (Record, Vol. I, p. 281-2).

Is it not interesting thus to listen to the "assumption" of the man who purchased the properties, who, as Evans says, "was representing Mr. Dingee" in the north (Record, Vol. I, p. 132), whose interest and

activity in the flotation of the Company could not very well have been exceeded, and whose familiarity with the history and progress of the enterprise was complete?

Amount: Two Millions of Dollars.

Securities: Present and after acquired property of the Company.

The Howard Bondholders: Evans and Evans' assignors, and some others, took some of these bonds through the man who originally suggested the idea of the Puget Sound plant to Dingee, who was allied with the Dingee interests, who was to participate equally with Dingee in the promotion profits, and who was looking to Dingee for the sales agency if and when the enterprise was floated.

G. Subsequent History of North Western Company.

And here again, I continue to speak in general terms, deferring for the present the discussion of details. The record shows:

1. Unlawful diversion by Dingee of proceeds of bond issue.

   And this is conceded only throughout the pleadings and proofs.

2. Cessation of operations at Kendall.

3. Enterprise a failure:

No works, no mill, no factory.

No plant established.

Abandonment of construction work conceded.

No cement whatever produced.

Not one dollar of income ever produced.

No dividend ever paid.

No sinking fund ever created.

Heavy indebtedness: Open, bond and interest accounts.

More enterprising competitors already in same field in 1907.

No stockholders' meeting after November 3, 1906:

> Once the bonds were authorized, stockholders' meetings became mere elegant superfluities.

Not a going concern: Howard, Record, Vol. I, p. 283; Evans, Record, Vol. I, p. 192.

4. Dissatisfaction and suspicions of the Howard bondholders.

5. Evans unanswered and ignored letters.

6. The Wenzelburger investigation.

7. Full discovery of the real situation.

8. Evans' agitation, trepidation as to his money, and threats of criminal prosecution.

9. Communication by Howard to Dingee of Evans' state of mind, and Dingee's consequent anxiety.

10. Evans' subsequent conduct:
Visit to San Francisco as soon as he could.
Conferences with Smith and Howard.

11. The interviews between Howard and Dingee, and Howard's reports.

12. Dingee's deliberate sacrifice of an independent corporation that he controlled, to placate the threatening Howard bondholders, and enable them to unload a bad and worthless investment upon that independent corporation, all done with the full knowledge, approval, consent, instigation and participation of those same Howard bondholders.

13. The subsequent repudiation of the notes by the injured corporation, and this litigation.

H. The Ultimate Problem Presented.

Aside from questions affecting consideration and delivery, this Court is called upon to determine whether there was a breach of corporate trust by Dingee; whether the Howard bondholders participated therein; whether there is or is not any protection for a corporation from participated breaches of trust; and whether it is agreeable to justice that alleged notes, the progeny of a participated corporate fraud, should be enforced.

All of these matters, we shall endeavor to present in their proper order.

There is nothing amazing about litigation of this type. Ever since corporations became active in the mercantile and financial world, such litigation has been notoriously common; and it has so grown with the flight of time, that now exhaustive tomes are given up to the discussion of corporate problems, and the time, attention and energies of the courts throughout the United States, and in the mother country, are devoted to the unraveling of corporate tangles, frauds and breaches of trust.

As far back as the days of De Foe, of immortal memory to every lover of literature, as far back as 1696, juggling and jobbery in corporate affairs was no new thing; and in his essay on "Projects," we find him saying:

> "Here begins the forming of public joint-stocks which, together with the East Indian, African and Hudson Bay Companies, before established, begot a new trade, which we call by a new name, stock-jobbing, which was at first only the simple occasional transferring of interest and shares from one to another as persons alienated their estates; but by the industry of the exchange brokers, who got the business into their own hands, it became a trade, and one, perhaps, managed with the greatest intrigue, artifice and trick that ever anything that appeared with a face of honesty could be handled

with. Thus stockjobbing . . . and projecting . . . indeed are now almost grown scandalous."

And that the scandalous aspect of the matter has persisted even unto this present day, let Mr. Cook attest:

"Perhaps the most striking feature of the modern era of industrial development is the growth, wealth, and power of corporations. They have built the railways, dug the canals, established the factories, carried the ocean commerce, and assumed control of the industries of Europe as well as of America. They have absorbed a large part of the surplus wealth of the world, and have been the means of making great profits. But these gains and profits have not always been honestly preserved and administered for the benefit of those who are entitled thereto—the stockholders of the company. Corporations, with their vast capital stock and their great income, have proved to be a temptation to corporate officers. These companies have been found to be efficient instruments of fraud and illegal gain. Corporations have become insolvent, and stockholders have lost their investments, while individuals have become millionaires.

"The expense, difficulty, and delays of litigation; the power and wealth of the guilty parties; the secrecy and skill of their methods; and the fact that the results of even a successful suit belong to the corporation, and not to the stockholders who sue, all tend to discourage the stockholders, and to encourage and protect the guilty parties.

"In England, ever since the year 1720, when the 'South Sea Bubble' exploded and unsettled the finances of the kingdom, there have been many instances of 'bubble companies' and dishonest promotors.

"In America the cases involving a breach of trust by the directors arise generally out of the management of corporations, and not in their formation.

"It is the purpose of this part of this work to explain, so far as is possible, the methods of those frauds, and to point out the remedy for the wrong."

2 *Cook, Corporations,* Ed. 1908, Sec. 643.

And so it will continue as long as human nature remains unchanged; for experience has demonstrated that men in the commercial world are very human indeed, and are swayed by the ordinary motives that inspire human conduct. Sometimes, the hope has been expressed that the great power of corporations would be used wisely, and that hope has been answered by grave utterances concerning the sobering effect of power: but the history of the corporate conception makes it wholly clear that nothing could be more fallacious than to appeal to the good will or benevolence of financial captains for the protection of the stockholders or the corporation. History, and especially the history contained in the decisions of the courts in corporate cases, bears it in upon us that the hope of the stockholder or the corporation for eco-

nomic well-being cannot be put in the assumed benevolence of any class of men, whether of high standing or of low standing, or whether of assumed high standing or of assumed low standing; one's observation of human nature repudiates that procedure; and one must concur in the impassive remark of Benjamin Harrison that "the man whose protection from wrong rests wholly upon the benevolence of another man or of a Congress is a slave—a man without rights." And since the appeal to benevolence,—even the appeal to enlightened self-interest,—has been found to be unavailing, the logic of events developed the appeal to legislation:—whence the ever-increasing mass of corporation laws the country over, designed to protect the stock-holder and the corporation from breaches of trust however ingenious or cunningly devised.

It was said by Mr. Justice Potter in a Rhode Island case (*Greene* vs. *Harris,* 11 R. I., 5) that "Human nature constitutes a part of the evidence in every case"; and in one of those innumerable corporation cases which occupy our courts, it was said by Mr. Justice Brewer, in delivering the opinion of the Supreme Court in *Louisville Trust Co.* vs. *Louisville Ry.,* 174 U. S., 688, that "Human nature is something whose action can never be ignored in the courts"; and while it is this very human nature that is responsible for so much, if not all, of our corporate litigation, yet it is fortunate that it is to this very human nature that the courts may look, not only to comprehend, but also to

interpret, the evidence in a given cause,—precisely as Mr. Justice Brewer did in the cause cited. And as we shall see hereafter, the books fully support the proposition that, in drawing inferences from the evidence, the courts are not hidebound, not bound down to the very letter of the evidence, but, especially where indirect processes are involved, may receive all the light which may be shed upon the evidence by their own common sense, and by their knowledge and experience of men and of life, of human nature and human motives, of human passions and human selfishness. In other words, it is always competent for a judge, deciding matters of fact, to use his knowledge of human nature and of the customs of human society in his efforts to interpret conduct and judge of its indications.

Knowing what we know of corporate history, and of what the California Code of Civil Procedure in Section 1960 refers to as "the usual propensities of "passions of men, the particular propensities or pas- "sions of the person whose act is in question, the "course of business, or the course of nature," we need discover nothing unprecedented in litigation of this type. So long as human nature remains the same, so long as the world-old motives continue to inspire human conduct, just so long shall we be confronted by the play of those motives and the operation of that nature in the field of corporate endeavor; and just so long will corporate litigation,—born of

the spirit of competitive enterprise, of the struggle for mastery, or of the passion for personal financial aggrandizement,—continue to occupy the courts; and that, too, in the face of all the corporation laws that the ingenuity of legislatures may frame.

No, there is nothing novel in litigation of the type here presented: the offending Adam remains with us ever, and will not be whipped out.

SPECIFICATION AND ASSIGNMENT OF ERRORS.

I.

The evidence received upon the trial of the above-entitled action is wholly insufficient to justify that of Finding II of the findings of the Referee herein on which Findings the decision herein is based, whereby it is found that on May 5, 1908, said Standard Portland Cement Corporation made, executed and delivered to the plaintiffs its promissory note dated May 1, 1908, for $30,000.00, which said promissory note is set out at length in said Finding II; and in this behalf, this petitioner for a new trial shows that said evidence fails to disclose any right, power or authority in the Vice-President or Secretary, or both, of said Standard Portland Cement Corporation to make, execute or deliver to said plaintiffs the promissory note in said Finding II, set out; and in this behalf, this petitioner for a new trial further shows that said

evidence discloses that the attempted making, execution and delivery of the promissory note referred to in said Finding II, by said Vice-President and Secretary of said Standard Portland Cement Corporation, was a legal fraud upon, and breach of trust against said Standard Portland Cement Corporation, committed by William J. Dingee, said Vice-President, and participated in by said plaintiffs.

2.

Said evidence is wholly insufficient to justify that part of Finding II, of the Findings of the Referee herein, on which Findings the decision herein is based, whereby it is found that said plaintiffs are and always have been the owners and holders of the promissory note in said Finding II, set out; and in this behalf, this petitioner for a new trial shows that there is no evidence herein to support said finding, or any finding, that said promissory note ever had any lawful existence, or ever was a legal obligation of said Standard Portland Cement Corporation.

3.

Said evidence is wholly insufficient to justify that part of Finding III of the Findings of the Referee herein, on which Findings the decision herein is based, whereby it is found that on May 5, 1908, said Standard Portland Cement Corporation made, executed and delivered to Charles D. Rand its promissory note

dated May 1, 1908, for $5,000.00, which said promissory note is set out at length in said Finding III, and in this behalf, this petitioner for a new trial shows that said evidence fails to disclose any right, power or authority in the Vice-President or Secretary, or both, of said Standard Portland Cement Corporation to make, execute or deliver to said Charles D. Rand the promissory note in said Finding III, set out; and in this behalf, this petitioner for a new trial further shows that said evidence discloses that the attempted making, execution and delivery of the prommissory note referred to in Finding III, by said Vice-President and Secretary of said Standard Portland Cement Corporation, was a legal fraud upon, and breach of trust against said Standard Portland Cement Corporation, committed by William J. Dingee, said Vice-President, and participated in by said Charles D. Rand, and said plaintiffs, his assignees.

4.

Said evidence is wholly insufficitnt to justify that part of Finding III, of the Findings of the Referee herein, on which findings the decision herein is based, whereby it is found that said plaintiffs, ever since the assignment and endorsement by said Charles D. Rand, of said promissory note to them, have been the owners and holders thereof; and in this behalf, this petitioner for a new trial shows that there is no evidence herein to support said finding, or any finding, that

said promissory note ever had any lawful existence, or ever was a legal obligation of said Standard Portland Cement Corporation.

5.

Said evidence is wholly insufficient to justify that part of Finding IV of the Findings of the Referee herein, on which Findings the decision herein is based, whereby it is found that on May 5, 1908, said Standard Portland Cement Corporation made, executed and delivered to T. R. Stockett, Trustee, its promissory note dated May 1, 1908, for $3,000.00, which said promissory note is set out at length in said Finding IV; and in this behalf, this petitioner for a new trial shows that said evidence fails to disclose any right, power or authority in the Vice-President or Secretary, or both, of said Standard Portland Cement Corporation to make, execute or deliver to said T. R. Stockett, Trustee, the promissory note in said Finding IV, set out, and in this behalf, this petitioner for a new trial further shows that said evidence discloses that the attempted making, execution and delivery of the promissory note, referred to in said Finding IV, by said Vice-President and Secretary of said Standard Portland Cement Corporation, was a legal fraud upon, and breach of trust against said Standard Portland Cement Corporation, committed by William J. Dingee, said Vice-President, and participated in by

said T. R. Stockett, Trustee, and said plaintiffs, his assignees.

6.

Said evidence is wholly insufficient to justify that part of Finding IV of the Findings of the Referee herein, on which Findings the decision herein is based, whereby it is found that said plaintiffs, ever since the assignment and endorsement by said T. R. Stockett, Trustee, of said promissory note to them, have been the owners and holders thereof; and in this behalf, this petitioner for a new trial shows that there is no evidence herein to support said finding, or any finding, that said promissory note ever had any lawful existence, or ever was a legal obligation of said Standard Portland Cement Corporation.

7.

Said evidence is wholly insufficient to justify that part of Finding V of the Findings of the Referee herein, on which Findings the decision herein is based, whereby it is found that on May 5, 1908, said Standard Portland Cement Corporation made, executed and delivered to Thomas Graham its promissory note dated May 1, 1908, for $1,000.00, which said promissory note is set out at length in said Finding V; and in this behalf, this petitioner for a new trial shows that said evidence fails to disclose any right, power or authority, in the Vice-President or Secretary, or both, of said

Standard Portland Cement Corporation, to make, execute, or deliver to said Thomas Graham the promissory note in said Finding V set out; and in this behalf, this petitioner for a new trial further shows that said evidence discloses that the attempted making, execution and delivery of the promissory note referred to in said Finding V, by said Vice-President and Secretary of said Standard Portland Cement Corporation, committed by William J. Dingee, said Vice-President, and participated in by said Thomas Graham and said plaintiffs, his assignees.

8.

Said evidence is wholly insufficient to justify that part of Finding V of the Findings of the Referee herein, on which Findings the decision herein is based, whereby it is found that said plaintiffs, ever since the assignment and endorsement by said Thomas Graham of said promissory note to them, have been the owners and holders thereof; and in this behalf, this petitioner for a new trial shows that there is no evidence herein to support that finding, or any finding, that said promissory note ever had any lawful existence, or ever was a legal obligation of said Standard Portland Cement Corporation.

9.

Said evidence is wholly insufficient to justify Finding VI of the Findings of the Referee herein, on

which findings the decision herein is based, whereby it is found that each of the promissory notes in said Findings mentioned was made, executed and delivered for a valuable consideration paid and delivered by the respective payees of said notes to said Standard Portland Cement Corporation on May 5, 1908, that is to say: on said date, the above named plaintiffs delivered to said Standard Portland Cement Corporation 30 bonds and 300 shares of the stock of the Northwestern Portland Cement Company, a corporation, and in consideration therefor there was delivered to the plaintiffs the promissory note set forth in the above mentioned Finding numbered 11, and that at the same time, Charles D. Rand delivered to said Standard Portland Cement Corporation 5 bonds and 50 shares of the stock of the Northwestern Portland Cement Company, a corporation, and in consideration therefor there was delivered to said Rand the promissory note set forth in the above mentioned Findings numbered III, and that at the same time, T. R. Stockett, Trustee, delivered to said Standard Portland Cement Corporation 3 bonds and 30 shares of the stock of the Northwestern Portland Cement Company, a corporation, and in consideration thereof there was delivered to said T. R. Stockett, Trustee, the promissory note set forth in the above mentioned Finding numbered IV, and that at the same time Thomas Graham delivered to said Standard Portland Cement Corporation 1 bond and 10 shares of the stock of the Northwestern Port-

land Cement Company, a corporation, and in consideration therefor there was delivered to said Thomas Graham the promissory note set forth in the above mentioned Finding numbered V; and in this behalf, this petitioner for a new trial shows that said evidence fails to show that any of said bonds or shares of said stock of said Northwestern Portland Cement Company, said corporation, hereinabove and in said Finding numbered VI referred to, were ever delivered to said Standard Portland Cement Corporation, or come into its possession, or under its control, or passed into its treasury; and in this behalf, this petition for a new trial further shows that said evidence discloses that said bonds and said shares of stock were delivered to and received by and passes into the treasury of said Northwestern Portland Cement Company; and in this behalf this petitioner for a new trial further shows that said evidence fails to show that any of the above mentioned promissory notes were made, executed or delivered for a valuable or any consideration, paid and delivered, or paid or delivered, by the respective or any payees or payee of said notes, or of any of them, to said Standard Portland Cement Corporation on May 5, 1908, or at any other time, or at all.

10.

Said evidence is wholly insufficient to justify the Findings of the Referee herein, on which Findings the decision herein is based, and more particularly

Finding numbered VII, wherein and whereby said Referee hath omitted to find upon every issue presented by the answer of said Standard Portland Cement Corporation in the above entitled action, and hath found that the same issues were presented in the equity suit numbered 15249 in said Finding VII referred to, and that said issues were in said equity cause determined adversely to said Standard Portland Cement Corporation; and in this behalf, this petitioner for a new trial herein shows that there was evidence before said Referee upon which the other issues referred to in said Finding VII should have been determined in the above entitled action, whether involved in the aforesaid equity suit or not, that the adverse determination of said other issues in said equity suit was not warranted, justified or sustained by the evidence in said equity suit, but was contrary to the evidence, and to the weight and effect of the evidence therein, and that said Referee should have found said issues in said equity suit numbered 15249, favorably to said Standard Portland Cement Corporation.

II.

Said evidence is wholly insufficient to justify the Findings of the Referee herein, on which Findings the decision herein is based, and more particularly the Finding of said Referee that said plaintiffs are entitled to judgment against said defendants, and each

of them, for the sum of $39,000.00, together with interest at the rate of six per cent. (6%) per annum, from the first day of May, 1908, compounded semi-annually, and for costs; and in this behalf, this petitioner for a new trial herein shows that said evidence discloses a valid defense on the part of said Standard Portland Cement Corporation in the above entitled action, and that upon the pleadings, evidence and record in said action said Standard Portland Cement Corporation was entitled to findings and judgment in its favor and against said plaintiffs.

12.

The decision given and made in the above entitled cause is contrary and against law because of errors of law occurring during the trial and excepted to by said Standard Portland Cement Corporation; and in this behalf, this petitioner for a new trial hereby makes express reference to the detailed specifications herein included in the Assignment of Errors under the aforesaid Ground Number 3, and makes them and each of them part and parcel of this specification.

13.

Said decision is contrary to and against law because of the insufficiency of the evidence to justify said decision; and said petitioner for a new trial hereby makes express reference to the detailed specifications herein included in the Assignment of Errors under

the aforesaid Ground number 1, and makes them and each of them part and parcel of this specification.

14.

Said decision is contrary to and against law, because said Findings failed to find, but should have found, that the financial crisis for the year 1907 began in the spring of that year, and that during the years 1907 and 1908 William J. Dingee was without funds wherewith to carry on any enterprise and was insolvent, and that said plaintiffs and their assignors received the par value of the bonds improperly found to have been purchased by said Standard Portland Cement Corporation, together with accrued interest thereon, up to the date of the promissory notes in the above mentioned Findings referred to.

15.

Said decision is contrary to and against law, because in and by said Findings, it is found that said Standard Portland Cement Corporation has no valid defense against or in the above entitled action, and is not entitled to any relief against the above named plaintiffs, and that the above named plaintiffs are entitled to judgment against said defendants in the manner and form stated in said Referee's Conclusions of Law in the above entitled action; whereas said Referee hath failed to find, but should have found, that said defendants, and in particular said Standard Portland

Cement Corporation, have a valid defense in and to the above entitled action, and are entitled to the relief prayed for in the answer therein and that the above named plaintiffs should take nothing by their action herein, and that said defendants and each of them should have judgment herein for costs.

16.

Said decision is contrary to and against law, because it failed to grant the relief prayed for by said Standard Portland Cement Corporation, and was given, made and rendered in favor of the above named plaintiffs and against the above named defendants, and because said decision was and is contrary to the evidence and to the weight and effect of the evidence, and to the case made and stated in the pleadings, evidence and record in the above entitled action.

17.

Said dcision is contrary to and against law, because upon the evidence received upon the hearing of said cause said Master and Referee erred in making his report and findings of fact and conclusions of law in favor of said plaintiff and against said defendants, and should have made his report and findings of fact and conclusions of law in favor of said defendants and against said plaintiffs.

18.

Said decision is contrary to and against law, because said Court erred in making and giving its order overruling the exceptions of said defendants, the Standard Portland Cement Corporation to said report and findings of fact and conclusions of law of said Master and Referee; and erred in confirming said report and findings of fact and conclusions of law; and erred in directing judgment for said plaintiffs and against said defendants in accordance with said report; and said Court erred in failing to sustain said objections of said defendant, Standard Portland Cement Corporation to said report, together with said findings of Fact and conclusions of law, and erred in failing to direct judgment in favor of said defendants and against said plaintiffs.

19.

Said decision was contrary to and against law, because said Court erred in making, giving, rendering and entering judgment herein, in favor of said plaintiffs and against said defendants: and erred in failing to give, make, render and enter therein its judgment in favor of said defendants and against the said plaintiffs.

20.

The Referee in the above entitled action erred in overruling the objection of said Standard Portland

Cement Corporation, to the following question asked the witness Ernest E. Evans on cross-examination in his deposition now on file in the above entitled action:

> "Mr. Evans, at the time of the sale of the bonds and stocks of the Northwestern Portland Cement Co. to the Standard Portland Cement Corporation, had you considered in your own mind the value of the assets of the Northwestern Portland Cement Company?"

Said objection was made upon the ground that said question and the evidence sought to be elicited thereby were incompetent, immaterial and irrelevant, and not pertinent to any issue in the case and assuming a fact as to which there was no evidence, to wit: that there was any sale to the Standard Portland Cement Corporation, and calling for the secret, uncommunicated mental processes of the witness: said objection was overruled by said Referee, to which ruling said Standard Portland Cement Corporation then and there duly excepted and now assigns the same as error.

21.

Said Referee erred in receiving, and in denying the motion of said Standard Portland Cement Corporation to strike out all of the testimony given by the witness Ernest E. Evans in his deposition now on file in the above entitled action, relative to the values, and particularly to the value of any estate of assets of the

Northwestern Portland Cement Company; said motion was made upon the ground that said testimony of said witness was incompetent, immaterial and irrelevant, without foundation,—it not appearing that the witness knew either the intrinsic value of the alleged assets or the market value thereof, and upon the ground that the answer as given was not responsive to the question asked. Said motion was denied by said Referee, to which ruling said Standard Portland Cement Corporation then and there duly excepted and now assigns the same as error.

22.

Said Referee erred in overruling the objection of said Standard Portland Cement Corporation to the following question asked the witness Ernest E. Evans on cross-examination in his deposition now on file in the above entitled action:

> "What figure, if any, did you put upon those assets?"

Said objection was made upon the ground that said question and the evidence sought to be elicited thereby were incompetent, immaterial and irrelevant, and not pertinent to any issue in the case and assuming a fact as to which there was no evidence, to wit: that there was any sale to the Standard Portland Cement Corporation, and calling for the secret, uncommunicated mental processes of the witness, and upon the further

ground that his mental condition, or mental processes, beliefs or private opinions, uncommunicated, are immaterial to any issue in this case, and do not constitute any fact or facts by which said Standard Portland Cement Corporation could or should be bound; said objection was overruled by said Referee, to which ruling said Standard Portland Cement Corporation then and there duly excepted and now assigns the same as error.

23.

Said Referee erred in receiving, and in denying the motion of said Standard Portland Cement Corporation to strike out the following answer given by the witness Ernest E. Evans on his cross-examination in his deposition now on file in the above entitled action:

> "Well I considered that they were worth between $240,000 and $250,000, that is, if the Company were liquidated."

Said motion was made upon all the grounds stated in the objection mentioned in the last preceding paragraph herein, and upon the further ground that said answer was purely speculative; said motion was denied by said Referee, to which ruling said Standard Portland Cement Corporation then and there duly excepted and now assigns the same as error.

24.

Said Referee erred in receiving, and in denying the motion of said Standard Portland Cement Corporation to strike out, the following answer given by the witness Ernest E. Evans on cross-examination in his deposition now on file in the above entitled action, in response to the question:

> "By 'liquidated' you mean?," namely, "That is to say, if the Company went into liquidation, and the assets were sold, they would realize between $240,000 and $250,000, but as a going concern I considered that was worth par easily, because the money which was actually spent in construction would have had to be spent anyhow."

Said motion was made upon all the grounds enumerated in paragraph 22 hereof, and upon the further ground that said answer is not responsive to the question asked, and upon the further ground that the witness was merely speculating as to possibilities, and not stating a fact, but making an argument: said motion was denied by said Referee, to which ruling the said Standard Portland Cement Corporation duly excepted and now assigns the same as error.

25.

Said Referee erred in receiving, and in denying the motion of said Standard Portland Cement Corporation to strike out the following passage from the tes-

timony given by the witness, Ernest E. Evans on cross-examination in his deposition now on file in the above entitled action:

> "Q. Considering the concern as a going concern, or as a concern the owners of which contemplated going ahead with it, would you have out a different figures upon the assets?
> "A. Certainly, the going ahead with it; I would consider it fully worth par."

Said motion was made upon all the grounds heretofore stated in paragraph 22 hereof and in the last preceding paragraph hereof; said motion was denied by said Referee, to which ruling said Standard Portland Cement Corporation duly excepted and now assigns the same as error.

26.

Said Referee erred in receiving, and in denying the motion of said Standard Portland Cement Corporation, to strike out the following passages from the testimony given by the witness Ernest E. Evans on cross-examination in his deposition now on file in the above entitled action:

> "Q. At the time referred to of the sale of your stocks and bonds to the Standard Portland Cement Corporation, did you have any information as to the plans of Mr. Dingee or Mr. Bachman for going ahead, or not going ahead with the Northwestern Cement Company?

"A. Yes; I distinctly understood all along that they were going ahead with this, only they had stopped it owing to the financial panic until things settled down again, and at the time that I met Dr. Bachman when he went to examine the property, of course, we spent the evening together, and he distinctly stated this Northwestern Portland Cement Company was to be eventually amalgamated with the Santa Cruz and the Standard Portland Cement Corporation."

Said motion was made upon all the grounds heretofore enumerated in the previous paragraphs herein, and upon the further grounds that the above mentioned answer was incompetent, immaterial and irrelevant, not responsive, involving hearsay, *ex parte* declarations of persons by whose statements the above named Standard Portland Cement Corporation would not be bound or should not be bound, and not proper cross-examination: Said motion was denied by said Referee, to which ruling said Standard Portland Cement Corporation then and there duly excepted and now assigns the same as error.

27.

Said Referee erred in receiving, and in denying the motion of said Standard Portland Cement Corporation to strike out, the following passage from the testimony given by the witness Ernest E. Evans on cross-examination in his deposition now on file in the above entitled action:

"What interest, if any, did you understand the Standard Portland Cement Company had in the Northwestern Cement Company?

"A. Well, the idea of starting the Northwestern Company was strategic, and with the idea of protecting the other factories."

Said motion was made upon all the grounds heretofore stated in the last preceding paragraph hereof: Said motion was denied by said Referee, to which ruling said Standard Portland Cement Corporation then and there duly excepted, and now assigns the same as error.

28.

Said Referee erred in receiving, and denying the motion of said Standard Portland Cement Corporation to strike out, a portion of the following passage from the testimony given by the witness John L. Howard on cross-examination upon the hearing in the above entitled action:

"Q. At the time of the purchase of the bonds of the Northwestern Portland Cement Company by the Standard Portland Cement Corporation was anything said by Mr. Dingee as to the plans of the Standard Portland Cement Corporation relative to the Northwestern?

"A. I don't recall that he said anything at that time, but both he and Bachman had frequently spoken of it before."

Said motion was made upon the ground that the latter

half of the foregoing answer was not responsive to the question asked: said motion was denied by said Referee, to which ruling said Standard Portland Cement Corporation then and there duly excepted, and now assigns the same as error.

29.

Said Referee erred in overruling the objection of said Standard Portland Cement Corporation to the following question asked the witness John L. Howard on cross-examination upon the hearing of the above entitled action:

> "Q. I call your attention to Defendants' 'Exhibit 2' and to the letter therein by the Standard Portland Cement Corporation to the Western Fuel Company dated March 8, 1906, and to the assignment therein dated June 30, 1906, by the Western Fuel Company to the Western Building Material Company of the sales contract between the Western Fuel Company and the Standard Portland Cement Company, and to the consent therein of such assignment by the Standard Portland Cement Company, and ask you what is the explanation of the provision in the letter and assignment to the effect that the sales contract may at any time be terminated at the option of the Standard Portland Cement Company in case you yourself should cease at any time to be the general executive officer of the Western Fuel Company or the Western Building Material Company?"

Said objection was made upon the ground that said question and the testimony sought to be elicited thereby were immaterial, irrelevant and incompetent, not proper cross-examination, without foundation in this, that it does not appear that the witness knows, and an attempt to vary the terms of a written instrument of parole evidence: said objection was overruled by said Referee, to which ruling said Standard Portland Cement Corporation then and there duly excepted and now assigns the same as error.

30.

Said Referee erred in sustaining the objection of the above named plaintiffs to the following question asked the witness John L. Howard upon the hearing of the above entitled matter:

> "Q. Now, it appeared then at that time that you were in doubt whether you learned of that at the time of the Wenzelburger report or whether you learned of it later?"

Said objection was made upon the ground that said question assumes something that is not in the case: said objection was sustained by said Referee, to which ruling said Standard Cement Corporation then and there duly excepted and now assigns the same as error.

31.

Said Referee erred in overruling the objection of said Standard Portland Cement Corporation to the

following question asked the witness Foster Young upon the hearing in the above entitled action:

> "Q. But you understood, anyhow, did you not, that he came there in accordance with the letter of May 4, 1908?"

Said objection was made upon the ground that said question and the testimony sought to be elicited thereby were incompetent and not proper cross-examination, and upon the further ground that the understanding of the witness is not evidence: said objection was overruled by said Referee, to which ruling said Standard Portland Cement Corporation then and there duly excepted and now assigns the same as error.

32.

Said Referee erred in granting the motion of the above named plaintiffs to strike out from the record in the above entitled action the minute book of the Northwestern Portland Cement Corporation, to which ruling said Standard Portland Cement Corporation then and there duly excepted and now assigns the same as error.

33.

Said Referee erred in sustaining the objection of the above named plaintiffs to the introduction in evidence upon the hearing of the above entitled action of the book containing the bond account and record of

subscriptions and sales of the bonds of the Northwestern Portland Cement Company: said objection was made upon the ground that said book was incompetent, immaterial, hearsay, and not the best evidence: said objection was sustained by said Referee, to which ruling said Standard Portland Cement Corporation then and there duly excepted and now assigns the same as error.

34.

Said Referee erred in sustaining the objection of the above named plaintiffs to the receiving in evidence upon the hearing of the above entitled action of the memorandum slip in the handwriting of William J. Dingee showing subscription for bonds of the Northwestern Portland Cement Company: said objection was made upon the ground that said memorandum slip was incompetent, hearsay and not binding upon any of the parties to this action, and not within the knowledge of the witness: said objection was sustained by said Referee, to which ruling said Standard Portland Cement Corporation then and there duly excepted and now assigns the same as error.

35.

Said Referee erred in sustaining the objection of the above named plaintiffs to the following question asked the witness Foster Young during the hearing of the above entitled action:

"Q. Has there ever been any question in your mind as to whether you held those bonds to the order of the Standard Portland Cement Corporation?"

Said objection was made upon the ground that said question was incompetent and immaterial and calling for the opinion and view of the witness: said objection was sustained by said Referee, to which ruling said Standard Portland Cement Corporation then and there duly excepted and now assigns the same as error.

36.

Said Referee erred in sustaining the objection of the above named plaintiffs to the following question asked the witness Foster Young during the hearing of the above entitled action:

"Q. Have you ever regarded the Standard Portland Cement Corporation as in any manner the owner of those bonds?"

Said objection was made upon the ground that said question was incompetent and immaterial and calling for the opinion and view of the witness: said objection was sustained by said Referee to which ruling said Standard Portland Cement Corporation then and there duly excepted and now assigns the same as error.

37.

Said Referee erred in overruling the objection of said Standard Portland Cement Corporation to the

following question asked the witness John L. Howard upon the hearing of the above entitled action:

> "Mr. Howard will you state to the Court what evidence of lime there were in this ground in Washington which was finally acquired by the Northwestern Portland Cement Company?"

Said objection was made upon the ground that said question and the testimony sought to be elicited thereby were immaterial, irrelevant and incompetent, and without foundation in this that it was not shown that the witness is competent, and upon the further ground that it was not a proper subject matter in any event for statement by the witness—he not having been shown to have been experienced in the line to which the inquiry was addressed, and upon the further ground that the witness was a general merchant and neither a geologist nor an expert upon these matters, and upon the further ground that it already appeared that the witness had not been actually on the spot: said objection was overruled by said Referee, to which ruling the said Standard Portland Cement Corporation then and there duly excepted, and now assigns the same as error.

38.

Said Referee erred in overruling the objection of said Standard Portland Cement Corporation to the

following question asked the witness John L. Howard at the hearing in the above entitled action:

"Q. What was its extent?"

Said objection was made upon the ground that no foundation had been laid, in this, that it did not appear that the witness knew: said objection was overruled by said Referee, to which ruling the said Standard Portland Cement Corporation then and there duly excepted and now assigns the same as error: and in this behalf this defendant, Standard Portland Cement Corporation, further assigns as error the ruling of said Referee admitting general statements by said witness John L. Howard as to the extent and size of the above mentioned lime deposits.

39.

Said Referee erred in overruling the objection of said Standard Portland Cement Corporation to the following question asked the witness John L. Howard during the hearing of the above entitled action:

"Q. Did this acceptance or any other acceptance by the Western Fuel Company in favor of either the Standard Cement Corporation or the Santa Cruz Portland Cement Company have anything to do or play any part in connection with the sale of the bonds of the Northwestern Portland Cement Company involved in this transaction?"

Said objection was made upon the ground that said question and the testimony sought to be elicited thereby were immaterial, irrelevant, and incompetent, and calling for the opinion and private judgment of the witness, and upon the further ground that the witness had already testified that he had no recollection as to anything else affecting these acceptances except what appeared on the paper itself: Said objection was overruled by said Referee, to which ruling said Standard Portland Cement Corporation then and there duly excepted and now assigns the same as error.

40.

Said Referee erred in overruling the objection of said Standard Portland Cement Corporation to the following question asked the witness John L. Howard during the hearing of the above entitled action:

> "Q. What knowledge or information did you have as to any intention on the part of Mr. Dingee that the bonds and stock of the Northwestern Portland Cement Company purchased by the Standard Portland Cement Corporation were not to be held by the latter company, but were to be turned over to the Northwestern Company?"

Said objection was made upon the ground that the question asked and the testimony sought to be elicited thereby were incompetent, being an effort to establish the intention of one person by the statements of another person: said objection was overruled by said

Referee, to which ruling said Standard Portland Cement Corporation then and there duly excepted and now assigns the same as error.

41.

Said Referee erred in receiving, and in denying the motion of said Standard Portland Cement Corporation to strike out the following passage from the testimony given by the witness John L. Howard during the hearing of the above entitled action:

> "Q. What knowledge or information did you have as to the actual disposition of the bonds and stock of the Northwestern that was sold to the Standard Portland Cement Corporation?
>
> "A. The only knowledge that I had was the fact of their delivery by Mr. Norcross to Mr. Young. Beyond that nothing."

Said motion to strike out was made upon the ground that the question asked and the answer calls for and states the conclusion of the witness, on the further ground that it does not appear that the witness had any real or personal knowledge upon the subject, and upon the further ground that he testified from hearsay only: Said motion was denied by said Referee, to which ruling said Standard Portland Cement Corporation then and there duly excepted and now assigns the same as error.

42.

Said Referee erred in overruling the objection of said Standard Portland Cement Corporation to the following question asked the witness Sidney V. Smith upon his direct examination during the hearing of the above entitled action:

> "Q. What took place at that interview as you remember it?"

Said objection was made upon the ground that the question and the testimony sought to be elicited thereby were immaterial, irrelevant and incompetent, and calling for hearsay and upon the further ground that it did not appear that the party or parties sought to be charged with what took place at that interview, or any representative of them was present thereat, and upon the further ground that as against the Northwestern Portland Cement Company, and particularly as against the Standard Portland Cement Corporation the preferred evidence was *res inter alios acta,* and self-serving: said objection was overruled by said Referee, to which ruling the said Standard Portland Cement Corporation then and there duly excepted and now assigns the same as error.

43.

Said Referee erred in overruling the objection of said Standard Portland Cement Corporation to the

following question asked the witness Ernest E. Evans during the hearing of the above entitled action:

> "Q. Mr. Evans state whether or not at the first interview which you and Mr. Spencer and Mr. Smith had with Mr. Howard in March, 1908, any proposal or suggestion was made to you and the other gentlemen with you, by Mr. Howard, as to any plan for relieving you of your investments in the Northwestern Portland Cement Company?"

Said objection was made upon the ground that said question was leading and suggestive: Said objection was overruled by said Referee, to which ruling said Standard Portland Cement Corporation then and there duly excepted and now assigns the same as error.

44.

Said Referee erred in finding that said Standard Portland Cement Corporation has no valid defense against or in the above entitled action, and is not entitled to any relief against the above named plaintiffs, and that the above named plaintiffs are entitled to a judgment against said defendants in the manner and form stated in said Referee's Conclusions of Law in the above-entitled action: to which said findings by said Referee, said Standard Portland Cement Corporation then and there duly excepted, and now assigns the same as error.

45.

Said Referee erred in failing to find, but should have found that said Standard Portland Cement Corporation has a valid defense in and to the above entitled action, and is entitled to the relief prayed for in his answer therein; and failed to find, but should have found, that the above named plaintiffs should take nothing by their action herein, and that said Standard Portland Cement Corporation should have judgment herein for its costs: which said action by said Referee, this petitioner for a new trial now assigns as error.

46.

Said Referee erred in not granting the relief prayed for by this petitioner, and in giving, making and rendering his report and findings in favor of the above named plaintiffs and against this petitioner for a new trial: and erred in not giving, making and rendering his report and findings in the above entitled cause in favor of this petitioner, and against the above named plaintiffs: and erred in giving, making and rendering his report and findings in the above entitled cause in favor of said plaintiffs and against said defendants upon the pleadings, evidence and record in the above entitled action: all of which said action by said Referee, this petitioner for a new trial now assigns as error.

47.

Said Referee erred in giving, making and rendering his report and findings in the above entitled cause in favor of said plaintiffs and against said defendants, in this, that said report and findings, and each and all of them, were and was and are and is contrary to law, not warranted, justified or sustained by the evidence, and contrary to the evidence and to the weight and effect of the evidence and to the case made and stated in the pleadings, evidence and record in the above entitled cause: all of which this petitioner for a new trial now assigns as error.

48.

Said District (Circuit) Court erred in overruling the objections and exceptions of said Standard Portland Cement Corporation to said report and findings of said Referee, in confirming said report and findings of said Referee, and in ordering judgment in the above entitled action in conformity with said report and findings: to all of which said Standard Portland Cement Corporation then and there duly excepted, and now assigns the same as error.

49.

Said District (Circuit) Court erred in giving, making, rendering and entering its judgment in the above entitled action in favor of said plaintiffs and

against said defendants, in conformity with said report and findings of said Referee: to all of which said Standard Portland Cement Corporation then and there duly excepted, and now assigns the same as error.

ARGUMENT.

I.

THE STANDARD PORTLAND CEMENT CORPORATION IS UNDER NO LIABILITY TO RESPOND TO THESE NOTES, FOR THE REASON THAT NO CONSIDERATION FOR THE NOTES EVER PASSED TO THE CORPORATION.

The claim is made by these Howard bondholders that these bonds and stocks were sold and delivered to the Standard Corporation for the notes in question; and the reply of the Standard to that claim, is, among other things, that there was no consideration for the notes, that no benefit accrued to it from the alleged transaction, and that no bonds or stocks of the North Western Company were ever delivered to it.

Of course, the necessity for consideration is so obvious that its absence or its inadequacy would be an earmark of indirection:

7 *Cyc.*, 690; 20 Id., 1413.

But the claim of the Howard bondholders is that the Standard Corporation purchased the bonds and

stocks of the North Western Company at par: taking over,

39 bonds out of 284 sold; or 1/7 of the outstanding bonds;

390 shares out of 50,000; or about 1/129th of the capital stock.

Bonds. But what is a corporate bond? Is it anything more than a fractional promissory note? Is it anything more, after all, than an agreement to repay a loan upon the terms stated? It does not of itself create any charge or lien upon the property of the company issuing it, or give the holder any priority over any other creditor; but it is usually secured by a mortgage or deed of trust which creates a charge and gives to the holders of the bonds secured a priority over those who may subsequently become creditors of the company.

Jones, Corporate Bonds & Mortgages, Sec. 170; *Zimmerman* vs. *Zimmerman,* 86 N. E. (N. Y.), 540.

Shares. And what specific right is conferred by shares?

"The right which a shareholder in a corporation has, by reason of his ownership of shares, is a right to participate *according to the amount of his stock* in the *surplus profits* of the corporation on a division, and ultimately on its dissolution in *the assets remaining after payment of its debts.*"

Richter vs. *Henningsan,* 110 Cal., 530, 534.

It is thus plain that neither a bondholder nor a shareholder is in any sense the owner of the property of the corporation as such: his claim is a mere incorporeality: it is stripped of immediate tangibility: it looks to the future and its hidden vicissitudes: in the one case, it is a promise; and in the other, a right to participate, if there be surplus profits or distributable assets.

Are not, therefore, both bondholder and shareholder dependent upon the assets and success of the corporation? If those assets be mere paper assets, if the enterprise be a failure, what honest value can be attached to the promises of the bonds or the hopes of the shares? Is it not plain that we are at once confronted with an inquiry into the assets and success of the North Western Company?

The assets of the North Western Company. What are the views of Mr. Evans?

Record, Vol. 1, p. 193: 217-220.

But will these declarations of this interested witness bear investigation? Naturally, he is anxious to swell these assets if he can: naturally, he wishes to put the best face possible upon this transaction: he would not be the very human individual that he is, if he did not: but fortunately the credulity of courts does not keep pace with the vigor or positiveness of any witness's testimony.

Blankman vs. *Vallejo,* 15 Cal., 639, 645;
Elwood vs. *W. U. Tel. Co.,* 45 N. Y., 549, 554;
Bank vs. *Diefendorf,* 123 N. Y., 191, 200;
Sonnenthiel vs. *Moerlein Brewing Co.,* 172 U. S., 401, 408.

1. THE LAND.

Evans' Visits.

According to his Deposition, Evans made but one visit to the land, so far as our reading exhibits, and that visit was in 1906 (Record, Vol. I, p. 197). But when Mr. Evans was a witness upon the Federal hearing, the number of his visits became enlarged to three. It does not appear, however, from his testimony as given upon the hearing here, as we read it, when his last visit was made; and the only light we are able to get upon that topic, comes from his statements in his deposition that he has never visited Kendall since 1906 (Record, Vol. I, p. 136). Taking together, then, all of his testimony, both upon deposition and upon the hearing here, and recollecting Howard's testimony that the visit to Kendall was made in June, 1906, recollecting that Evans testified upon his deposition at the place cited that he has never visited Kendall since 1906, and recollecting that the N. W. Co. was not incorporated until August 27th, 1906, we respectfully insist that the only fair conclusion to be drawn from this condition of the Record is that Evans

has never set foot upon the premises since the organization or incorporation of the N. W. Co.

Character of Examination.

This is not disclosed. We are not advised, in the remotest degree, as to the care or attention with which any examination whatever was made, where Evans went, what he did, how he did it, or what precautions if any to insure accuracy he observed. As to the character of examination of the premises made by him during that brief visit in 1906, Mr. Evans maintains a most discreet silence.

Results of Examination.

These reflect back some light upon the carefulness and accuracy of Evans' examination of the premises, and the consequent reliability of his views.

HIS TESTIMONY:

Total Area: Between 640 and 1000 acres: Record, Vol. I, p. 226.

Area of Lime Deposits: 320 acres: Record, Vol. I, p. 226.

Agricultural Value:

(a) "I have not the least idea": Record, Vol. I, p. 227.

(b) The flat land, between $15,000 and $20,000: Record, Vol. I, p. 227.

Height of First Lime Exposure: 250 to 300 feet: Record, Vol. I, p. 227.

Land "all cleared": Record, Vol. I, p. 136.

But

The total area was not between 640 and 1000 acres;
The area of lime deposits was not 320 acres;
The agricultural value of the land was not between $15,000 and $20,000;
The height of the first lime exposure was not between 250 and 300 feet;
Land not "all cleared."

With these exceptions, Mr. Evans' testimony may be commended as convincingly reliable.

THE REAL FACTS:

Total Area: 520 acres: Davis, Record, Vol. II, p. 580.

Area of Lime Deposits: Not quite 80 acres, probably 60: Davis, Record, Vol. II, p. 583.

And the four claims referred to were 20 acres each: Davis, Record, Vol. II, p. 580.

Agricultural Value: Worthless: Davis, Record, Vol. II, p. 581.

Except about 60 acres: Davis, Record, Vol. II, p. 582.

And the following significant corroborative circumstances should be considered:

And Zender sold his farm for $6000: Howard, Record, Vol. II, p. 350.

And he bought his hay in Bellingham.

And the farmers were not madly infatuated with the agricultural capabilities of the district: Davis, Record, Vol. II, p. 583.

Height of First Lime Exposure: 600 feet: Record, Vol. II, p. 596.
60 acres cleared: 40 grubbed.

And these specific details by this civil engineer stand wholly uncontradicted.

What value, then, can we attach to Evans' effort to swell the value of this land? His argument is that the bonds and stocks had a real value of from $240,000 to $250,000 behind them; and he names this land as one of the principal items making up his valuation; and yet,

His lowest general area is 120 acres too great;
His highest general area is 480 acres too great;
His lime deposit area is between 4 and 5 times too great;
His agricultural valuation is in shrieking discord with the facts; and
His statement as to the height of the first lime deposit is not one-half of what it should have been.
He is utterly wrong as to the clearing of the land.

Can any reliance be put upon such testimony as this?

This testimony was the merest conjecture and useless for any legal purpose:

Reed vs. *Drais,* 67 Cal., 492-3;
N. Y. Mg. Co. vs. *Fraser,* 130 U. S., 611.

And it must also be borne in mind that the infirmities of this testimony infect Evans' general estimate as given on cross-examination at his deposition.

2. THE PLANT AT KENDALL.

This never existed, and does not exist now.

3. THE B. B. & B. C. RY. STOCK.

Evans' testimony upon this subject is very halting and imperfect.

He does not appear to know how many shares there were.

He does not appear to know that Dingee, the faithless trustee, had, entirely without any authority whatever, pledged them to secure the debt of another company.

He nowhere attempts to place any value upon these shares (Record, Vol. I, p. 193, 209).

4. "THE SANTA CRUZ PORTLAND CEMENT COMPANY OWED THEM A CONSIDERABLE AMOUNT OF MONEY, WHICH I CONSIDERED GOOD."

Record, Vol. I, p. 193.

In approaching the consideration of this statement by Evans, it is proper to point out that this declaration is not a declaration made *ante litem motam*. The declaration was made in the course of Evans' deposition, made after this suit was commenced, and when Evans was a litigant. One need not do more than refer to the leading case upon the subject, namely, the *Berkeley Peerage Case,* 4 Campbell, 401, wherein the inherent weakness of declarations made *post litem motam* is considered. The inherent weakness of this

testimony requires that it should be received with considerable caution, and it has been deemed a proper restriction that declarations of this character should not be received at all, if there is any reason to believe that a controversy has been commenced, the existence of which might prejudice the declarant or offer him temptations to deceive; and in such cases, the courts will not enter into any inquiry as to the probable effect of such controversy—it is enough that such controversy existed. In a word, when Evans made this declaration, he had on his war paint, and was testifying with a purpose, and for a purpose as a biased litigant.

It is next to be observed that, in addition to the foregoing discount, the testimony does not recommend itself. Evans is here speaking of March, 1908, which was the very time when:

A. He had lost confidence in Dingee to the extent that he refused to accept Dingee's assurance that he would go on with the Kendall scheme (Record, Vol. I, p. 191-2).

B. When he knew from Wenzelburger's report that Dingee was an embezzler and faithless trustee.

C. When he knew that the same man whom he had lost confidence in, whose assurance he refused to accept, and whom he knew to be a faithless trustee, was the very man who was in control of the Santa Cruz Co.;

D. When he knew from Howard, who was familiar with the Santa Cruz affairs as its sales agent and bond floater, that the Santa Cruz Co. was burdened by a heavy bonded debt, discounted by its bad product, and not an assured success—"far from it" (Howard, Record, Vol. I, p. 291);

E. When he knew that the Santa Cruz Co. had not paid its debt to the N. W. Co., although controlled by Dingee;

F. When he knew from Wenzelburger's report that it was to this very Santa Cruz Co. that Dingee had unlawfully diverted part of the N. W. Co.'s funds;

G. When he knew that Dingee, master of the Santa Cruz Co., was a financial wreck;

Evans, Record, Vol. I, p. 189-190;
Howard, Record, Vol. II, p. 529-30, 540, 543-4.

H. When he knew that the Santa Cruz Co. was not responsible, and showed it by rejecting that Company's note when offered by Dingee,—an opinion that was shared by Howard, who advised taking the note of the Standard. When put to the test, Evans' acts spoke louder than his present biased words.

How can Evans treat any obligation of the Santa Cruz Co. to the N. W. Co. as adding anything to the latter Company's assets? How could he honestly

"consider good" any debt of the Santa Cruz Co., then tottering upon the verge of the same dismal fate that overtook the N. W. Co.?

5. MACHINERY.

This "machinery," which was afterwards shipped to Santa Cruz by Dingee's orders, was, in Evans' contemplation, limited to a couple of donkey engines.

Evans, Record, Vol. I, p. 193.

6. STOCK OF N. W. CO.

No attempt is made to put any value upon it, whether market or otherwise; indeed, it nowhere appears that it had any market value.

7. BONDS OF N. W. CO.

No attempt was made to put any value upon them. On the contrary, it appeared that they had never been listed upon any bond or stock exchange.

CONCLUSION AS TO EVANS:

His testimony can scarcely be said to supply gilt edge to the artistically engraved pieces of paper that, as the result of conferences between the Howard bondholders and Dingee, Dingee's directors caused the Standard's notes to be issued for.

As an appraiser of land values, he was grotesquely incompetent: so far as the placing of any plant is con-

cerned, he furnishes a useful definition of the word "nothing": he does not even attempt any valuation of the B. B. & B. C. Ry. stock, or of the N. W. Co. bonds or stock, or of the machinery,—to wit: the brace of donkey engines: his attitude as to the debt from the Santa Cruz Co. to the N. W. Co. is transparently insincere; and if his version exhibits anything, it shows an abandoned hole in the ground not even big enough to contain the burden of debt attached to it.

No one knew better than Evans that the security was not good for the loan: no one knew better than he that the "alleged" investment, to use Evans' own language, at Kendall was worthless; and his own acts and conduct demonstrate it, independently of Howard's declaration to him that there was not the investment at Kendall to represent the amount that Howard thought Dingee had received.

Howard, Record, Vol. II, p. 535.

And Evans' willingness to surrender the secured N. W. Co. bonds and stocks for the unsecured one-year note of the Standard, reflects with illuminating vividness his own opinion of the remarkable value of the N. W. Co. bonds and stocks. The very anxiety with which he was consumed, to get rid of these bonds and stocks, and the promptness of his concert with Dingee in the plan to unload them upon the disconnected corporation then to his knowledge in the hollow of Dingee's hand, are facts eloquent with discount of what,

with undoubted sarcasm, Evans would describe as N. W. "securities." It is, of course, his role to swell the assets of the N. W. Co. if he can: but why should he do this, if not from his consciousness that some front must be presented to cover the deplorable ineptitude of these so-called securities? Evans' motives in this are obvious: but he can not prevent those motives from laying bare his real opinions. Mr. Justice Brewer tells us:

> "Human nature is something whose action can never be ignored in the courts, and parties who have acquired full and absolute title to property are not as a rule donating any interest therein to strangers."
>
> *Louisville Trust Co.* vs. *Louisville, etc., Ry.*, 174 U. S., 674, 688.

Evans tells us that he wanted to get rid of these bonds—these magnificent bonds, this splendid investment: he wanted to get rid of them:

> Record, Vol. I, p. 191-2: 192-3.

But a mere bowing acquaintance with human nature would advise us that parties who have acquired full and absolute title to bonds with a quarter of a million of assets behind them even in liquidation, but worth par as a going concern (Evans, Record, Vol. I, p, 217-220), do not enter into arrangements with an insolvent president controlling a corporation it-

self financially fragile, whereby such bonds are surrendered for the unsecured note of that financially fragile corporation, without exhibiting the hollowness of their pretensions as to the value of such bonds.

And how delightfully refreshing is the sincerity of the gentleman who tells us at page 219 of Vol. I that the assets of the N. W. Co., *"as a going concern"* were "worth par easily"; and who tells us that when, in February, 1908, he received the Wenzelburger report, he then knew that the N. W. Co. was not a going concern (Vol. I, p. 192); and yet, on March 25-26, 1908, agrees with Dingee, through his agent Howard, to take the note of the Standard for these wretched bonds at par; and actually, in May, 1908, receives that note at par; and is now seeking to enforce it against the betrayed corporation.

And What Are the Views of Mr. Howard upon this Subject Matter?

It is true that while a witness he attempted no valuation: but, nevertheless, his point of view is sufficiently exposed: Record, Vol. II, p. 362-3.

The Bonds. "The property and plant will represent the bonds" (Letter, Howard to Evans, May 20, 1906: Record, Vol. II, p. 362).

But the bond issue was Two Million Dollars.

And the outstanding bonds, according to the allegations of the Answer, aggregated $284,000. The "prop-

erty," however, did not cost over $17,800. How then could the property represent the bonds? Unless one is prepared to take violent leave of his common sense, it cannot properly be claimed that the property represented the bonds. Nor did the plant: for there was no plant to represent anything.

The Stock: Mr. Howard declares: "The promo-
" ters' shares cannot be made valuable without giving
" equal value to the bonus stock, and this value will
" depend upon the earning power of the concern, and
" that is largely dependent upon the management."

Record, Vol. II, p. 362-3.

But, where was "the concern"? No inquiry could well be more pertinent: where was the concern? But when we ask where was the concern, the words of Cicero that we used to read at school come back to us: We ask where was the concern, and *"Saxa et solitudines voci respondent":* we ask where was the concern, but only rocks and solitudes respond to the voice. Even Evans tells us that the North Western Company to his knowledge, was not a going concern: indeed, it was not a concern at all: it was merely an addition to the already long list of corporate failures. And what earning power had this mythical concern? What did it ever earn so as to give any value to the stock? What has it ever produced except the sacrifice of the Standard Corporation to Evans' demands and Dingee's private necessities?

B. B. & B. C. Ry. Howard's general views concerning this Railway are contained in the Record and in his correspondence. Howard, it will be remembered, was in close and confidential touch with Dingee as to B. B. & B. C. Ry. affairs, and went into the road on Dingee's stock, and even helped Dingee to acquire control, advancing money to help him to pay Nineteen Thousand Dollars ($19,000.00) that he was short when negotiating for the Cornwall interests, and Howard at that time subscribed for nineteen (19) of the bonds of the North Western to help Dingee in the purchase of the Cornwall interest (See Howard's interesting testimony on this subject). Howard speaks of the inadequate rolling stock of the company: he concedes that the road was not a great commercial success; and he declares that the road looked to the projected cement plant at Kendall to give the eastern end of the road an efficiency and value which it did not theretofore possess. At all events, Howard, addressing Dingee, declared to him that "You want "eventually to sell the road and we must keep in "mind the fact that it should not be handicapped "with an unprofitable contract with the Cement Co. "which might militate against the sale" (See letter of September 24, 1906, Record, Vol. III, p. 795). Howard admits that there was no cement market upon the route of the B. B. & B. C. Ry.: that no freight rate was ever definitely established with any connecting carrier; and that the road suffered from "pressing

needs." And that the road was not a commercial success, and that its needs were very pressing may be gathered, also, from the testimony of the Auditor for the road who declared that the net earnings of this magnificent enterprise for the fiscal year ending June 30, 1908, were the enormous sum of $28.98 (Record, Vol. III, p. 687). Is it any wonder that this small concern, of insignificant mileage, should suffer, as Howard said it suffered, from the original sin of bad location and poor equipment? Its mileage, upon its main line, was only 49.47 miles, and upon its spurs, only 18.06 miles (Record, Vol. III, p. 687). And Howard complains of its "small equipment of cars," and urges "more rails are needed to improve the line."

Shall we be particularly astonished if we are told that this small concern was burdened by debt upon bond account and floating indebtedness? Its bond account amounted to $659,000.00 (Record, Vol. III, p. 686) : its floating indebtedness had climbed to the sum of $263,834.42 (Record, Vol. III, p. 686) ; and in other words, in round numbers, its debt was about $20,000 per mile. Is it any wonder that an additional bond issue was projected? But when the additional bond issue was projected, and application made to Rollins & Sons, the bond experts, to float the projected additional bond issue, these experienced men flatly declined to touch the thing.

None of these people ever regarded the purchase of the B. B. & B. C. Ry. as a permanent investment:

they sought to control it only to sell it. The road was like Hodge's razors in the poem of our school days: it was controlled only to be sold. Even Taylor was anxious to sell it; and its sale was always in the contemplation of the parties.

To sum it all up in the language of Howard, who was for some time one of its officers, it was just "struggling to keep afloat": it was not keeping afloat easily: it was not keeping afloat without effort: but it was "struggling to keep afloat." And it was the stock of this magnificent jerkwater enterprise that Dingee embezzled, made away with, and along with other securities illegally pledged to one stranger company to cover the debt of another stranger company.

Limestone Deposits. Howard was not qualified either by training or experience to express an opinion upon this subject matter. He never even got upon the ground to make any real examination of the deposits. He nowhere descends to such vulgar details as length or depth, but, the bellows giving out, he stands apart, at gaze, and with his Argus optic, pierces even unto the bowels of Mother Earth. He substitutes conjectures and epithets for facts: but in the eyes of experienced Judges, epithetic testimony has no value whatever—it is open to those lines of condemnation, which are so frequent in negligence cases, of the testimony of witnesses who undertake to say that the train was traveling at a "frightful" rate of speed, or

that the automobile was going at a "terrible" gait. And the futility of Howard's conjectural guessing is fully exposed by the testimony of Civil Engineer Davis, which will be referred to in a moment.

Summary as to Howard. After all, perhaps Howard's real view of the value of this enterprise and its assets may be illustrated by the fact that he never put into it a single dollar of his own money. He never subscribed to a single bond: he never paid a single dollar for a single share of stock: to use his own language, he was not "a bona fide investor of money" (Record, Vol. II, p. 543).

Summary as to this Testimony. Aside from Kendall itself, the Company had no real assets: its only visible assets, if they can be called such, were the lands at Kendall; and it had none other. Both Evans and Howard were incompetent to fix the land values at Kendall. Their actual acquaintance with the lands was limited: they were but rarely upon the lands, and then only for short intervals; and it does not even appear, according to our recollection of the testimony, that either of them ever succeeded in actually climbing the hill. A mere opportunity afforded for observation will not constitute one an expert or render his opinion admissible as evidence (*Goldstein* vs. *Black,* 50 Cal., 462, 465; *Est. of Blake,* 136 Id., 306, 307): but neither Evans nor Howard had any real opportunities for observation: they never had the op-

portunity to become qualified to speak concerning this land. They were ignorant of, and did not pretend to state, their intrinsic or market values; and their views, such as they were, were mere speculative guess-work. And the actual price paid for the lands, although special prices at that, are quite inconsistent with their views, thus, $4,000.00 were paid for the Mansard piece, and $6,000.00 for the Riedle claims, and $6,000.00 for the Zender farm, and $1,800.00 for the Howard 80 acres, aggregating $17,800.00 in all.

This company, then, was a mere speculation, doubtful from the start, and ending in failure. Its land area was restricted to 520 acres, of which much was waste land. Its available area was small, not exceeding 80 acres. Near by were business rivals,—the Balfour Guthrie Co. It was burdened by heavy obligations,—by its open account, its bond account, and its interest account. Its funds were in large measure diverted from it. It suffered from consequent lack of development and achievement. It had no works, mill, factory or plant. It had earned no income, and none was expected or possible. It paid no dividends. It had no sinking fund. It produced nothing. In March, 1908, Mr. Evans understood the situation perfectly. He knew that the security was wholly insufficient to cover the loan. He knew that this non-producing hole in the ground was no representative for the bonds, that no works were established, and that the condition of its affairs foreshadowed disaster. He

knew that Howard had never invested a dollar of his own money at Kendall, that Howard did not think that the investment was there, and that there was not any going concern there; and, as an acute and experienced business man, he must have known that if any trustee had dared to invest trust funds in such a misadventure, no chancellor on earth would hesitate to surcharge his account with the amount so invested.

Views of Davis. The criticism presented is supported by the views of Civil Engineer Davis: Record, Vol. II, p. 579-588; 596-600.

He went to Kendall in April, 1907, and remained until Sept., 1908:

13 quarter sections of 40 acres each, was the total area:

The 4 upper sections, or Riedle sections, were upon the side of a hill at an elevation of 1000 or 1200 feet: "that was hilly and rocky":

These were 20 acre claims:

Between these and the Zender farm, coming down the hill, were the Howard claims: 4 of 20 acres each:

Of the Riedle 80 acres, only 12.14/100 acres were cleared:

These Riedle acres are worthless for agriculture, being too high, too steep, rocky and without soil:

The same is true of the Howard 80 acres.

The only development work that was at all done on these Howard 80 acres was the building of a little shack on Claim No. 2:

Below the hill, at the portion where the plant was to be installed, 60 acres were cleared, of which 40 were grubbed, and this was the total amount of development work:

The entire tract was very poor for agriculture, being a mass of rocks, without top soil, except one 40 acre patch, one 20 acre patch, and a piece on the Howard claim about 20 by 30 feet in size:

Zender procured the hay for his cattle at Bellingham:

Davis procured his labor among the farmers of the district: at $5 or $6 per day, they made more money teaming than they did on their farms:

There were four or five months of winter, when the sun would rise about 7 or 7:30, and it would commence to get dark about 3:30 or 4:

Lime deposits were found on two of the Riedle claims and two of the Howard claims, but nowhere else on this territory:

No exploration work was done for the purpose of determining the extent of the visible lime deposits:

He could form no judgment as to the extent of the lime deposits,—as to how much rock was there, or how far the rock went down or in.

The deposits there would not authorize the erection of a plant of any particular capacity without further exploration: no further exploration was made:

The plant to be erected there was to be a 5000 barrel per day plant capable of being doubled:

An adequate exploration and examination of the lime deposits could not be done under six months: it was not possible to do such a thing in twenty-four hours:

Actual Work Done on the Premises:

Cleared 60 acres: 40 acres grubbed; one mile graded for spur track: this spur track space was 100 feet wide: cut ties for track: laid 5000 feet of track.

Structures:

A few rough shacks.

The first lime deposit was 600 feet above level of the flat:

All of our machinery and tools were shipped to Santa Cruz by Mr. Dingee's directions, in August, 1908:

So far as these bonds are concerned, all that the Standard got was the promise to pay of a corporation known by all to be a failure and to be destitute of any assets to support that promise: so far as the stock is concerned, what surplus profits would it entitle the Standard to participate in, or in what assets remaining upon dissolution after payment of the N. W. Co.'s

debts? Is it any wonder thit Evans wanted to get rid of them? Can we not now understand why his mind reverted to the criminal liability of Dingee? Is it not plain that he fully realized that these wretched badges of failure and misappropriation represented nothing? And what greater fraud could have been put upon the Standard than to unload upon it these worthless scraps of paper? And that, too, at par and with the accrued interest.

Pepper vs. *Addicks,* 153 Fed., 383;
Cf. Slater Trust Co. vs. *Randolph Coal Co.,* 166 Id., 171.

The Position of the N. W. Co. Further Considered. Let us look a little more closely into the position of the N. W. Co., so as to assist us on this question of consideration, in assessing the equity or inequity of a transaction whereby the worthless securities of a bankrupt concern are, by agreement with a faithless fiduciary and with the connivance of his puppets, put off at par upon an innocent corporation.

1. *The Corporate Character of the N. W. Co.* What was there in this to justify the claim that the bonds and stocks were worth par to the Standard? Or worth anything to it?

A. *Corporate Franchise.* This was worthless. Calling it a privilege to transact certain business in a certain way, within the State of Washington, and with-

in the limitations of the Washington legislative scheme regulating foreign corporations,—still, it was a privilege which had become practically nullified by the treason of Dingee upon the one hand, and by the activity of alert business rivals upon the other; and it was a privilege which had become worse than useless, because the vehicle for spoliation, treachery and dishonesty.

Earning capacity is a correlate of the value of a corporate franchise:

> *Wilcox* vs. *Gas Co.,* 212 U. S., 19; 53 L., 382;
> *S. V. W. W.* vs. *S. F.,* 165 Fed., 695;
> *Montgomery Co.* vs. *Schuylkill Bridge Co.,* 28 Atl. (Penn.), 408.

In *S. V. W. W.* vs. *San Francisco, Supra,* it was observed by Circuit Judge Gilbert that the "value of the franchise and "going business depends upon their earning power"; and in *Montgomery Co.* vs. *Schuylkill Bridge Co., supra,* the opinion in which case is approvingly quoted by Circuit Judge Gilbert in *S V. W. W.* vs. *San Francisco, supra,* while speaking of the value of a corporate franchise the Court says:

> "Their value necessarily depends upon their productiveness. If they yield no money return over expenditures, they would possess little if any present value" (p. 408).

But the most powerful microscope producible by

the combined energies of modern scientific men would be utterly incapable, if applied to this record, to discern therein any "earning power" or "productiveness" of the franchise of the North Western Portland Cement Company.

B. *Non-exclusive Character of this Franchise.* And in point of fact, as we shall see more fully hereafter, other more alert and more honest business rivals actually did seize the field.

C. *And the N. W. Co. was a "Foreign Corporation."* It was thus subject to restrictions and limitations, both existent and possible, arising from Washington Statutes or changes of corporate policy.

And it was a corporation formed in one State for the acknowledged and avowed purpose of exercising in fact its principal activities in another State.

Elliott, Corporations, Sec. 550: Not favored.

2. *Original Cost of Construction of Plant.*
Plant defined:

Old Colony Trust Co. vs. *Standard Sugar Co.,* 150 Fed., 677.

But: no plant having been established, and the only tangible asset being the land, what does the record exhibit as to that? Taking outside figures, we have:

Mansard: .....$4000.
Riedle: ..... 6000.

Zender:	6000.
Howard:	1800.
Total actual cost of land:	$17800.

These figures are, however, subject to serious discounts:

A. *The Land in General.* A fair consideration of all the evidence in this case makes it very clear that this land was not purchased at a price established by public sales in the way of ordinary business: But the phrase "Market value" is defined in the *Am. & Eng. Ency. of Law* (19 *Ency. Law,* 2nd Ed., 1153) to be a "price established by public sales in the way of ordinary business"; and the authorities collected in the accompanying note are themselves, as well as the definition itself, entirely inconsistent with the theory that the value of land is to be admeasured by the peculiar personality or special purposes of a corporation or individual. There can be no middle ground between the universally accepted criterion of market value, upon the one hand, and the personal needs or special uses of the individual, upon the other: the former is impersonal: it is independent of the individual: it is a growth or product from the usual operations of business: it takes no account of the private needs, capricious judgments, or fanciful valuations of individuals; and while it possesses a certain measure of stability, the fancy estimates of value of

property to the owner are as fickle and fluctuating as the special uses, private views, whims or personal greed of individuals.

But a fair analysis of all the evidence in this cause shows the case to be one wherein special prices were paid for a special use,—the special use of a proposed cement plant: aside from its availability, such as that may or may not have been, for this special purpose, this land was of no value to any of these speculators, none of whom were farmers or wood-cutters, or had any intention of withdrawing from the civilized world in order to farm or hew wood in a wilderness whose denizens made more money driving teams than they did in farming. The plain fact is that, the line deposits aside, the only other value that this land had was the natural timber that was there when the place was located; and even this timber was more or less scattered.

And Mansard, Riedle and Zender knew what was what: they fully understood the situation, and acted accordingly: ordinary self-interest would impel them, knowing what the land was wanted for, to get all that the traffic would bear; and every consideration suggested by one's knowledge and experience of that human nature which is a part of the evidence in every case concurs in repelling the thought that they were making presents to persons whom they were not in any way obligated to. To quote Mr. Justice Brewer:

"Human nature is something whose action can never be ignored in the courts, and parties who have acquired full and absolute title to property are not as a rule donating any interest therein to strangers."

Louisville Trust Co. vs. *Louisville, etc., Ry.*, 174 U. S., 674, 688.

But the special price that may be paid because of a special, intended use, is not a proper criterion whereby to fix the value of land: such a criterion overlooks the impersonal character of market value, and confuses value with the special use of the intending purchaser. But the land is not to be valued in the light of any convenience or association which might make it peculiarly desirable to a particular purchaser who designs devoting it to a special use; on the contrary, it is to be valued solely with regard to the elements which would make up its worth to any person, generally.

The discount upon land values arising from the fact that a special price was paid because of a special, intended use, is general as to all the land: but there is a special discount as to the Howard 80 acres.

B. *The Howard 80 Acres.* I have put this item in at $1800. but the reality was this:

80 acres at $2.50 per acre, Government price $ 200.

Other expenses: attorneys' fees, witness fees, traveling expenses, etc..... 1600.

And the fact that Howard made the location under the Stone and Timber Act demonstrates the agricultural uselessness of these 80 acres. 7 Fed. Stat. Ann., 301: "unfit for cultivation."

And the only lime deposits were upon that ½ of these 80 acres which included the first and second Howard claims,—in other words, less than 40 acres.

Davis, Record, Vol. II, p. 583.

3. *Amount Expended in Permanent Improvements.*

There were no "permanent improvements":

Stark vs. *Starr,* 1 Sawy., 15 Fed Cas.;
Cullop vs. *Lenord,* 33 S. E., 611.

Aside from compulsory development work, all that was done upon the premises was:

1 mile of spur-way;
60 acres cleared, of which 40 were grubbed; and
Setting up certain small, rough shacks.

4. *Appreciation or Depreciation of "Plant."*

Ever since Nov. 22, 1907, nothing has been done at Kendall: the monumental architectural relics there,—the shacks, to wit,—have been abandoned to the thaws of Spring, the heat of Summer; the winds of Autumn, and the snows of Winter; and the only caretaker that relevant history advises us about, is the caretaker for the Riedle claims perched on the top of the hill:

Howard, Record, Vol. III, p. 876.

There was no appreciation here,—depreciation only, and the waste and silence of desolation and failure.

5. *Amount of Bonded Indebtedness.*

Authorized Issue.....	$2,000,000.
Bonds actually sold, and delivered	284,000.

There is no measure of value to be found here:

S. V. W. W. vs. *San Francisco,* 124 Fed., 592-3; *Knoxville* vs. *Knoxville Water Co.,* 212 U. S., 1, 11; 53 L., 379, at bottom 1st column and top 2nd column.

6. *Permanence and Stability of "Plant."*

Here, there was no plant of which either permanence or stability could have been predicated.

7. *Earning Capacity of "Plant."*

Here, the earning capacity was nil. Nor could any earnings be honestly expected: for the place was destitute of plant: it was destitute of improvements: there was no mill upon it: there was no railroad upon it: there were no shipping facilities upon it: it never had a yearly use: it never had an annual value: it never produced a pound of cement: it has been an unqualified failure; and to the complete knowledge of Evans and his adherents, the place has remained an undeveloped, unimproved and unproductive waste. And

when we consider the varying capabilities of soils even within restricted areas, the uncertain cost of production, the uncertainties of labor, the vagaries of weather and climatic conditions, the doubtfulness of yields, the eccentricities of prices and profits, the effect upon large concerns of changes of governmental policies, and so on, we realize that nothing could well be more speculative than the hazarding of a guess as to the future earning capacity of an enterprise that never had an actual beginning, but whose whole history is an illumination of the word "loot."

8. *Intelligent and Skilful Management.*

Here, there was nothing to manage: ever since Nov. 22, 1907, all operations have ceased; and no audible voice has told us anything of any resumption of operations.

9. *Risks of the Business.*

Here, there was no business to endure or weather any risks. We do know, however, that the N. W. Co. was surpassed by more alert business rivals.

10. *There was no "Going Concern."*

Knoxville vs. *Knoxville Water Co.,* 212 U. S., 1, 9; 53 L., 378.

In the Knoxville Water Case, *supra,* while discussing the valuation of the property, and considering an

item of "$60,000 for 'going concern,'" Mr. Justice Moody, in delivering the unanimous opinion of the Court, said:

> "The latter sum ($60,000 for going concern) we understand to be an expression of the added value of the plant as a whole over the sum of the values of its component parts, which is attached to it because it is in active and successful operation and earning a return."

How a mere negation,—without any plant, or business, or management, or production, or earning capacity, that never produced a single pound of cement, that never earned a single dollar, that had expended upon it only what Evans described as "very little," and that has been abandoned since 1907,—how such a negation can be called a "Going Concern," resembleth the peace of God, in this, that it passeth all human understanding. And is it any wonder, then, that long before that conclave of the powers and "crowned heads" which occurred in March, 1908, and long before the notes in suit were issued, Evans knew that this sham was not a going concern?

Record, Vol. I, p. 192.

11. *The N. W. Co. was Insolvent in the Winter of 1907-8, and thereafter.*

A. *Elements of Insolvency.*

a. *Its Assets were grotesquely insufficient to meet its liabilities.*

Only Real Assets: 520 acres of land costing $17,800.

But this land, as we have seen, was purchased at a special price for a special use.

Liabilities: On Bond Account alone, $284,000.

And the proceeds from these bonds were not in the corporate treasury, but were diverted from proper corporate purposes and misappropriated.

b. *The N. W. Co. was not "prosecuting its line of business."*

In plain truth, it had never reached the point where it had any business to prosecute.

c. *Since Nov. 22, 1907, there has been no prospect or expectation of the N. W. Co. continuing business.*

The record leaves no doubt about this: nothing has been done that we are advised of, since Nov. 22, 1907, when all operations ceased; and if any enterprise may fairly be described as abandoned, this one may.

Not only have all operations ceased, but all machinery and tools have been removed, and have never been returned so far as we are informed.

And Dingee's assurances to Evans that the enterprise would continue,—assurances that time has belied,—were utterly rejected by Evans:

Record, Vol. I, p. 191-2.

d. *The N. W. Co. was not a Going Concern.*

Evans' direct testimony to that effect: Record, Vol. I, p. 192.

And the Supreme Court definition leaves no doubt of it. Going Concern is "the added value of a plant "as a whole over the sum of the values of its compo- "nent parts, which is attached to it because it is in "active and successful operation and earning a re- "turn."

Knoxville vs. *Knoxville Water Co.,* 212 U. S., 1, 9; 53 L., 378, Moody, J.

e. *In Nov. 1907, there was a cessation of all operations.*

This is the direct and uncontradicted testimony of Civil Engineer Davis.

f. *Most significant steps were taken which practically incapacitated the N. W. Co. from pursuing the enterprise.*

These included:

The misappropriation of its funds.
The cessation of all operations.
The removal of all machinery and tools.

g. *The embarrassments of the N. W. Co. were such that failure was inevitable.*

Thus:

It was dominated by a faithless fiduciary.

Its funds had been misappropriated.

Its B. B. & B. C. Ry. stock had been embezzled to make an unlawful pledge to assist a strange corporation.

Its operations had all ceased.

Its machinery and tools had all been taken away.

The abandonment of the plant was permanent (*Castle* vs. *Logan,* 140 Fed., 707, 709); and since November, 1907, there has never been any recurrence of operations on the plant in question.

The views of Taylor, President of the Bellingham Bay & British Columbia Railway, throw some additional light upon the rational method of assessing the value of the bonds of a commercial enterprise. Speaking of Taylor, Howard tells Dingee:

"Mr. Taylor says the debt stands:

Bonds	$659,000.00
Due D. O. Mills	111,000.00
Due B. & D. Coal Mining Co	139,000.00
	$909,000.00

"Further, that the deed of trust contains many objectionable provisions that were inspired or permitted by P. B. Cornwall; that the latter's connection with this bond issue was in some way not creditable; that E. H. Rollins & Sons have the call on the balance of the bonds at $95.00; that

bonds may be issued only on main line construction and that the road must always earn double the amount of the bond interest" (Letter from John L. Howard to W. J. Dingee, dated San Francisco, March 5, 1907: Record, Vol. III, p. 815-6).

But the mythical concern known to disappointed bondholders as the Northwestern Portland Coment Company never earned "double the amount of the bond interest," never earned "the amount of the bond interest," never earned a dollar; and if it be true, as we think it is, that earning capacity be considered as a test or correlate of the value of the bonds of a commercial enterprise, then the bonds here involved are worthless.

On March 21, 1907, Howard writes Bachman advising him that Rollins & Sons, the bond experts, will not place the new bond issue of the B. B. & B. C. Ry. —a concern then earning for its year's work at least $28.98 (Record, Vol. III, p. 687: Testimony of E. H. Hammond, General Auditor of B. B. & B. C. Ry.), which was $28.98 more than the Northwestern Portland Cement Company ever earned; and with this letter, Howard encloses to Bachman a letter from Taylor setting forth the views of Rollins & Sons as to what constitutes "salable bonds," and in that regard Taylor says, speaking of the representative of Rollins & Sons: "He claimed that if the new improvement coupled " with the increased business, should increase the earn-

" ings of the road to the extent that we anticipate, the " bonds would be salable, but not otherwise" (Record, Vol. III, p. 819). From this passage, it is plain that the bond expert looked to the earning capacity of the concern in question to give value to the bonds and make them "salable": very plainly, he knew that the bonds of a dead enterprise, which not only never earned a dollar, but died "a-bornin' " as the consequence of Dingee's unlawful misappropriation of its funds, would have no value; and equally plainly it was to the effective development, progressive activity, tangible earning capacity, and accomplished results of the enterprise that he looked to give value to its securities.

And the same thought dominated the minds of the Howard bond holders: what they were concerned with in the spring of 1908, was the establishment of the plant at Kendall and the prompt production of cement there; and they took no account of any other consideration, nor of any scraps of claims against other tottering or struggling companies. Evans, in his deposition, after admitting his desire to get rid of these bonds, makes it entirely clear that he predicated his own conception of the value of these bonds upon the establishment of the plant at Kendall, upon his faith in the establishment of which plant he had subscribed for the bonds; for he tells us that, "I considered that it was not right that this Northwestern Portland Cement Company should be a loaning institution, which it vir-

tually was—that I subscribed my money for legitimate commercial purposes" (Record, Vol. I, p. 192-3). And so too with Howard, as we have seen, it was to the plant that he looked to give any value to the bonds. Indeed, the proposition that, in March 1908 and about the time of the conclave of the "crowned heads"—to adopt Howard's phrase—these bond holders were concerned with the establishment of the plant at Kendall, and were not then looking to the after thoughts subsequently conjured up by the ingenuity of counsel: the proposition that the bond holders then looked to the establishment of the plant at Kendall to give value to the bonds, and that when the establishment of that plant failed in consequence of Dingee's defalcations they wanted to get rid of the bonds and get their money back, regardless of any other consideration,—the proposition that they regarded the plant as the backbone of the bonds and that they felt, when that was broken, that the bonds had no value:—this proposition we submit, finds ample support throughout this record. During the spring of 1908 these Howard bond holders considered that the value of the bonds was dependent upon the establishment of the plant at Kendall, and these bonds ceased to have any value, either in their eyes or in fact, when they learned that their hopes for the plant had been shattered by Dingee's embezzlements. It is respectfully submitted that no man of affairs can read this record without perceiving that what was in the bond holders' minds

at the time when this transaction took place was that these bonds were worthless, because the plant had not been established, and that this record can not be analyzed without leaving the conviction that the reasons which these bond holders had for the action which they pursued are all reducible to Dingee's criminal failure to establish the plant at Kendall. The bond holders give no place in their minds at the time when this transaction took place to any claim by the Northwestern Company against corporations like the B. B. & B. C. Railway which, as Howard tells us, was "suffering from the original sin of bad location and cheap construction" (Record, Vol. III, p. 810), which was encumbered by a heavy bonded and floating indebtedness and which was just "struggling to keep afloat" (Record, Vol. III, p. 860); nor did these bond holders predicate any of the reasons they had for the action which they pursued upon the Santa Cruz Portland Cement Company, whose product, as Howard tells us, was a failure until as late as June, 1908, whose success, Howard tells us, was far from assured, and the offer of whose note by Dingee these very bond holders rejected. On the contrary, in their minds at the time when this transaction took place, the one and only source of value of these wretched bonds was to be found in the establishment of the plant at Kendall; and when that failed by reason of Dingee's criminality, which was so prominent in the minds of Evans and his brother, these bond holders realized that the bonds had

no value and that, to use Evans' phrase, they should be got rid of (Record, Vol. I, p. 192-3): we respectfully submit, in a word, that from this record no other conclusion can be drawn except this, that in the minds of these bond holders at the time when this transaction took place, and in point of fact also, the value of these bonds and the establishment of the plant, were reciprocal and complementary quantities, that one was dependent upon the other, and that the failure to establish the plant destroyed any pretended value of the bonds, reduced them to such condition of worthlessness that the single anxiety of these bond holders was to get rid of them.

II.

THERE HAS NEVER BEEN ANY DELIVERY OF THE ALLEGED BONDS OR STOCKS TO THE STANDARD PORTLAND CEMENT CORPORATION.

When the minds of the parties met on March 25-26, 1908, and as the result of that meeting of minds, a concerted plan of action was agreed upon, to be carried out subsequently by Dingee with the aid of his subservient vassals upon the directorate of the Standard Portland Cement Corporation, Evans endorsed the certificates in blank, and sent them, together with the alleged bonds, not to the Standard Portland Cement Corporation at all, but to John L. Howard, the go-between who acted for the Howard bond holders in

the interviews with Dingee. The letter of April 13th, 1908, which appears on page 167 of Vol. I of the Record, transmits two thousand (2,000) shares of N. W. Co. stock, and gives the numbers of certificates transmitted, and also the number of shares covered by each certificate. Nearly all of these shares were subsequently endorsed to the order of Dingee, and thereafter to L. F. Young, trustee. Thus, certificate No. 65 apparently wrongly referred to on page 197 of Vol. I of the Record as Certificate No. 165, was so endorsed: so also Certificate No. 66: so, also, Certificate No. 68: so also Certificate No. 69 apparently wrongly referred to as Certificate No. 169; and these certificates account for 1,450 out of the 2,000 shares, all of which were endorsed to the order of Dingee, and subsequently transferred to L. F. Young, trustee, but none of which appear to have been endorsed or transferred to the Standard Corporation. At the time when Evans sent down these bonds and stocks to his friend Howard, Mr. Young was Secretary of the Santa Cruz Company, the Standard Company, the Standard Corporation, and the Santa Cruz Lime Company, with his office in the Crocker Building in San Francisco: he was Secretary for each of these companies individually, and not for them as a mass of corporations; and each of these companies "kept its accounts and assets separate from those of the others." As part of the plan and program which had been arranged at the meeting of March 25-26, 1908, Norcross, who at this time was

Secretary of the Western Fuel Company, and also of the Western Building Materials Company, of each of which companies Howard, the go-between, was President, brought certain bonds and stocks to Mr. Young, which are claimed to be the bonds and stocks "purchased" by the Standard Corporation. Mr. Young received the stock and bonds on May 4th or 5th, 1908; and since the alleged special meeting of the directorate of the Standard Corporation was held on May 5th, 1908, it is evident from these facts, as well as from the entire history disclosed in this cause, that whatever occurred between Mr. Norcross and Mr. Young, occurred as part and in furtherance of the prearranged scheme which had been entered into on March 25-26, 1908. At this time, all of these parties, Evans, acting for himself and his assignors, Howard and Dingee, were all acting together and in concert to accomplish a common design, which design, as we know was directed against the Standard Corporation. This design was formulated at the meeting on March 25-26, 1908: all that transpired subsequently in relation to the alleged "purchase" of the bonds of the Northwestern failure by an outside corporation which had neither need nor funds to purchase them, occurred by reason of, and was inspired by, the concerted purpose of these confederates; and what each of them did in furtherance of the common design, is properly chargeable against all of them. The common design, however, was not accomplished until fully completed, and until

that point was reached the acts, conduct and declarations of any one of the confederates would be provable against and binding upon the co-confederates.

Mr. Young's testimony shows plainly that these bonds and stocks never got into the treasury of the Standard Corporation, but on the contrary by direction of one of the confederates, Dingee, he put these bonds and stocks into the treasury of the Northwestern Company. And Mr. Young made the following uncontradicted statement: "I have held the actual pos-" session of the bonds ever since they were delivered to " me by Mr. Norcross. Neither the Standard Port-" land Cement Corporation nor anybody else has ever " made any demand on me for these bonds; neither the " Standard Portland Cement Corporation nor anybody " else, to my knowledge, has even done anything to se-" cure the possession of either the bonds or the stock. " I will state this, that I am ready, willing and anxious " to deliver these bonds to anybody who is the real " owner, and I hold them for that purpose" (Record, Vol. III, p. 943).

And later on, at page 955 of the same Volume the following occurred:

> "MR. BROBECK—Q. Yesterday, in response to a question by Mr. Olney reading as follows: 'Has the Standard Portland Cement Corporation to your knowledge ever done anything to secure the possession of either the bonds or the stock?' you answered, 'No, nobody has, to my knowledge.

I will state this, that I am willing and anxious to deliver these bonds at any time to anybody who is the real owner, and I hold them for that purpose.' What meaning did you intend to convey by that answer, Mr. Young?

"A. I thought that perhaps Mr. Dingee might complete the transaction as I understood it was made—might take up the notes and demand the bonds himself or they might belong to the Northwestern Portland Cement Co. When I received these bonds, Mr. Dingee instructed me to put them in the treasury of the Northwestern Portland Cement Co. The Standard Portland Cement Corporation has never, to my knowledge, asserted any title to these bonds or suggested to me that I held them subject to any right which they might have to them."

These bonds and stocks were never listed among the assets of the Standard Corporation, nor have the notes ever been charged or listed among the liabilities of that corporation (Young, Record, Vol. III, p. 718; Cole, Record, Vol. III, p. 768-9).

The net result of all the testimony upon this subject matter is that whatever may or may not have happened to these bonds and stocks, one thing is clear, they did not get into the treasury of the Standard Corporation; and that company never acquired any possession of them or any dominion or control over them. Whether this was right or wrong would seem to be something of an academic question: at all events no one need be sur-

prised by the commission of any wrong by Dingee: but all that does not, nevertheless, put the bonds and stocks into the treasury of the Standard Corporation, so that it could exercise control over them. On the contrary, these bonds and stocks went beyond the control of the Standard and into the treasury of the Northwestern: do Messrs. Howard and Evans wish the Standard Corporation to burglarize the treasury of the Northwestern Company? It may be added that there must be acceptance to constitute a delivery (*Bank* vs. *Bailhache,* 65 Cal., 327; *Powell* vs. *Banks,* 48 S. W. (Mo.), 664; *Tate* vs. *Clement,* 35 Atl. (Pa.), 215; *Davenport* vs. *Whisler,* 46 Ia., 287; *Rosseau* vs. *Blean,* 14 N. Y. S., 712, 716): but what proof is there before this Court of any acceptance of these bonds or stocks by the Standard Portland Cement Corporation?

III.

A FRAUDULENT BREACH OF TRUST WAS COMMITTED BY DINGEE AGAINST THE STANDARD CORPORATION.

In approaching this subject matter, it is proper to bear in mind certain principles in the light of which, we submit, this controversy should be resolved. "'Equity jurisdiction,' therefore, in its ordinary ac-"ceptation, as distinguished on the one side from the "general power to decide matters at all, and on the "other from the jurisdiction 'at law' or 'common-law "jurisdiction,' is the power to hear certain kinds and

" classes of civil causes according to the *principles* of " the method and procedure adopted by the court of " chancery, and to decide them in accordance with the " doctrines and rules of equity jurisprudence, which " decision may involve either the determination of the " equitable rights, estates, and interests of the parties " to such causes, or the granting of equitable reme- " dies."

Pomeroy's Equity Jurisprudence, 3rd Edition, Section 130.

And that the expansion of equitable remedies has kept pace with the increasing complexities of modern business relations is entirely clear from the views expressed by the Supreme Court. Thus, it is observed by Fuller, C. J., in *U. P. R. R.* vs. *Chicago, etc., R. R.,* 163 U. S., 600, that "In the increasing complexi- " ties of modern business relations equitable remedies " have necessarily and steadily been expanded, and no " inflexible rule has been permitted to circumscribe " them"; and to quote the language of Daniel, J., in *Byers* vs. *Surget,* 60 U. S. (19 Howard), 308, "The " true and intrinsic character of proceedings, as well in " courts of law as *in pais,* is alike subject to the scrutiny " of a court of equity, which will probe, and either " sustain or annul them, according to their real char- " acter, and as the ends of justice may require." Mr. Justice Harlan, in *White* vs. *Cotzhausen,* 129 U. S., 344, tells us that "Courts of equity are not to be misled

by mere devices, nor baffled by mere forms": Chief Justice Chase, in *Texas* vs. *Hardenberg,* 77 U. S. (10 Wallace), 89, tells us that "Equity looks through forms to substance"; and in *Jones* vs. *New York Guaranty Co.,* 101 U. S., 628, Mr. Justice Swayne said "Nor will it (a court of equity) give its aid in the "assertion of a mere legal right contrary to the clear "equity and justice of the case."

In the next place, in approaching the question whether Mr. Dingee committed a fraudulent breach of trust against the Standard Corporation, it would not, we assume, be irrelevant to present, if not a definition, at least a description of what constitutes fraud in equity; and perhaps as succinct a statement upon that subject as any, is the following, taken from the last Edition of Bouvier:

> "*Equity Doctrine of Fraud.* It is sometimes inaccurately said that such and such transactions amount to fraud in equity, though not in law; according to the popular notion that the law allows or overlooks certain kinds of fraud which the more conscientious rules of equity condemn and punish. But, properly speaking, fraud in all its shapes is as odious in law as in equity. The difference is that, as the law courts are constituted, and as it has been found in centuries of experience that it is convenient they should be constituted, they cannot deal with fraud otherwise than to punish it by the infliction of damages. All those manifold varieties of fraud against which specific

relief, of a preventive or remedial sort, is required for the purposes of substantial justice, are the subjects of equity and not of law *jurisdiction.*

"What constitutes a case of fraud in the view of courts of equity, it would be difficult to specify. It is, indeed, part of the equity doctrine of fraud not to define it, not to lay down any rule as to the nature of it, lest the craft of men should find ways of committing fraud which might escape the limits of such a rule or definition. 'The court very wisely hath never laid down any general rule beyond which it will not go, lest other means for avoiding the equity of the court should be found out.' *Per Hardwicke, C.,* in 3 Atk., 278. It includes all acts, omissions, or concealments which involve a breach of legal or equitable duty, trust or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another. 'It may be stated as a general rule that fraud consists in anything which is calculated to deceive, whether it be a single act or combination of circumstances, whether it be by suppression of the truth or suggestion of what is false; whether it be by direct falsehood, or by innuendo, by speech or by silence, by word of mouth or by a look or a gesture. Fraud of this kind may be defined to be any artifice by which a person is deceived to his disadvantage.' *Bisph. Eq.,* Sec. 206.

"It is said by Lord Hardwicke, 2 Ves. Ch., 155, that in equity fraud may be presumed from circumstances, but in law it must be proved. His meaning is, unquestionably, no more than this: that

courts of equity will grant relief upon the ground of fraud established by a degree of presumptive evidence which courts of law would not deem sufficient proof for their purposes; that a higher degree, not a different kind, of proof may be required by courts of law to make out what they will act upon as fraud. Both tribunals accept presumptive or circumstantial proof, if of sufficient force. Circumstances of mere suspicion, leading to no certain results, will not, in either, be held sufficient to establish fraud.

"The equity doctrine of fraud extends, for certain purposes, to the violation of that class of so-called imperfect obligations which are binding on conscience, but which human laws do not and cannot ordinarily undertake to enforce; as in a large variety of cases of contracts which courts of equity do not set aside, but at the same time refuse to lend their aid to enforce: 2 *Kent,* 39; 1 *Johns. Ch.,* 630; 1 *Ball & B.,* 250. The proposition that 'fraud must be proved and not assumed,' is to be understood as affirming that a contract, honest and lawful on its face, must be treated as such until it is shown to be otherwise by evidence, either positive or circumstantial. Fraud may be inferred from facts calculated to establish it. Per Black, C. J., in 22 Pa., 179; 148 Id., 234; 59 Fed. Rep., 70.

"The following classification of frauds as a head of equity jurisdiction is given by Lord Hardwicke, J., in *Chesterfield* vs. *Janssen,* 2 Ves., 125; 1 Atk., 301; 1 *Lead Cas. Es.,* 428.

"1. Fraud, or *dolus malus,* may be actual, aris-

ing from facts and circumstances of imposition. 2. It may be apparent from the intrinsic nature and subject of the bargain itself, such as no man in his senses and not under delusion would make, on the one hand, and no honest or fair man would accept, on the other. 3. It may be inferred from the circumstances and condition of the parties: for it is as much against conscience to take advantage of a man's weakness or necessity as of his ignorance. 4. It may be collected from the nature and circumstances of the transaction, as being an imposition on third persons."

Bouvier, Vol. 1, 844-5.

And in this connection, it may be pointed out that a very satisfactory definition of breach of trust will be found in Sec. 1079, of *Pomeroy's Equity Jurisprudence;* and that in Sec. 1094 of the same authority we see the carriage of Pomeroy's concept of "Breach of Trust" into corporate affairs.

It must, however, be plain to the simplest apprehension that fraud, and especially corporate fraud, is a secret and devious thing, and the more so in proportion to the intelligence and experience of the participants. Thus, in holding that subsequent facts may be utilized to establish an antecedent fraud, the local Supreme Court observes:

"The proofs in cases of fraud are usually circumstantial: frauds are a species of the *crimen falsi,* which, like larceny, are not done openly.

They are usually shown as inferences from facts established, rather than as facts expressly proven."

Butler vs. *Collins,* 12 Cal., 457, 464.

And the general characteristics of fraud are further explained in the following quotation from a recent Montana case:

"The great issue in this case was fraud. The existence of fraud was determined by an overwhelming line of findings by the jury. See statement of the case preceding this opinion. Fraud cannot often be proven by direct evidence. Fraud conceals itself. It does not move upon the surface in straight lines. It goes in devious ways. We may with difficulty know 'whence it cometh and whither it goeth.' It 'loves darkness rather than light, because its deeds are evil.' It is rarely that we can lay our hand upon it in its going. We are more likely to discover it at its destination, before we know that it has started upon its sinuous course. When we so discover it, the searchlight of a judicial investigation goes back over its trail and lightens it from beginning to end. As a woodsman follows his game by slight indications, as a broken twig or a displaced pebble, so fraud may become apparent by innumerable circumstances, individually trivial, perhaps, but in their mass 'confirmation strong as proofs of holy writ.' The weight of isolated items tending to show fraud may be 'as light as the shadow of drifting snow,' but the drifting snow in time makes the drift, the avalanche,

the glacier. Fraud may hang over the history of the acts of a man like the leaden-hued atmosphere upon the house of Usher, 'faintly discernable but pestilent, an atmosphere which has no affinity with the air of Heaven.' . . .

"In question of fraud a wide range of evidence is allowed. Fraud assumes many shapes, disguises, and subterfuges, and is generally so secretly hatched that it can only be detected by a consideration of facts and circumstances which are not infrequently trivial, remote and disconnected. To interpret their meaning, or the full meaning of any one of them, it may be necessary to bring them together and contemplate them all in one view. In order to do this it is necessary to pick up one here and another there until the collection is complete. A wide latitude of evidence is therefore allowed, in order that fraud may be detected and exposed."

Merchants' National Bank vs. *Greenhood,* 41 Pac. Rep., 259 (Mont.).

And from these general considerations, it obviously results that a preconceived, premeditated plan to defraud, specifically formulated in actual words, need not be exhibited by the evidence, if the natural effect of the acts of the parties charged be to secure the undue advantage denounced by equity.

It is obvious common sense that a man's declarations count for nothing if they are belied by his acts and conduct—his actions speak louder than words. In-

deed, under the California Code of evidence, demonstration of any fact in issue is never required (C. C. P., Sec. 1826); and even in criminal cases, where human life is at stake, it is from the surrounding facts and circumstances that one must gather the intent or intention of the actor (P. C., Sec. 21).

In all human controversies, it is to the acts and conduct of the party, rather than to his declamations, that the law looks in seeking to define his intention. As observed by an accomplished Federal Judge, "Men are not made with windows in their breasts through which we may read the motives of their conduct."

U. S. vs. *Foster,* 6 Fed., 247.

It is, however, fortunate, to adopt the language of another learned Federal Judge, that

> "The laws of thought are not suspended when the inquiry arises in a court of justice."

Standard Elevator Co. vs. *Crane Elevator Co.,* 76 Fed., 767.

The rule that actions speak louder than words is applied by the courts to a great variety of circumstances, but no better illustration of the use of this rule can be suggested than cases involving the issue of fraud: for nothing avoids the light more than fraud. The result of all the relevant authorities is that a man's protestations of purity are not any answer to the effect

of his acts; and that if he is guilty of acts which defraud another, his declarations that his intentions were honest can not be taken as sufficient to overthrow his acts.

Civil Code, Secs. 1571-1574;
Thornton vs. *Irwin,* 43 Mo., 153;
Ashton vs. *Dashaway Ass'n.,* 84 Cal., 61, 68;
Sukeforth vs. *Lord,* 87 Id., 399, 408;
Pacific Vinegar W'ks. vs. *Smith,* 145 Id., 352, 369;
Cross vs. *Cross,* 15 N. E. (N. Y.), 333;
Coleman vs. *Burr,* 93 N. Y., 17, 31;
Babcock vs. *Eckler,* 24 N. Y., 623;
Cheatham vs. *Hawkins,* 80 N. C., 161, 165;
The Telegraph vs. *Lee,* 98 N. W. (Iowa), 364;
Bramblet vs. *Com. Land Co.,* 83 S. W. (Ky.), 599;
United, etc., Co. vs. *Smith,* 90 N. Y. D., 199, 204;
First Nat. Bk. vs. *Northup,* 109 Pac. (Kans.), 672, 675;
Thomas vs. *Sweet,* 14 Pac. (Kans.), 545, 556-7.

"Judicial inquiries are into the rights of the parties; and although high and honorable character has, and ought to have, great influence in weighing testimony in which that character is in any manner involved, yet, when the inferences from that testimony are drawn by others, and a court is required to pronounce the law arising upon

them, character is excluded from the view of the judge, and legal principles alone can be acknowledged as his guide."

Marshall, C. J. *Etting* vs. *Bank of U. S.,* 11 Wheat., 73.

"When the acts consist of making a combination calculated to cause temporal damage, the power to punish such acts, when done maliciously, cannot be denied because they are to be followed and worked out by conduct which might have been lawful if not preceded by the acts. No conduct has such an absolute privilege as to justify all possible schemes of which it may be a part. The most innocent and constitutionally protected of acts or omissions may be made a step in a criminal plot, and if it is a step in a plot neither its innocence nor the Constitution is sufficient to prevent the punishment of the plot by law."

Holmes, J. *Aikens* vs. *Wisconsin,* 195 U. S., 206.

"It would be in vain to administer justice in such courts, if mere statements of intention would outweigh the legal effects of the acts of the parties."

Story, C. J., dissenting. The *Nereide,* 9 Cranch, 444.

"The ordinary rule (is) that a man is bound to

contemplate the natural and probable consequences of his own act."

Brown, J. *Lazarus* vs. *Phelps,* 152 U. S., 85.

"The principle that no one shall be permitted to deny that he intended the natural consequence of his acts when he has induced others to rely upon them, is as applicable to insurance companies as it is to individuals. . . . This principle is one of sound morals as well as of sound law, and its enforcement tends to uphold good faith and fair dealing."

Field, J. *Globe Mutual Life Ins. Co.* vs. *Wolff,* 95 U. S., 330.

In a case which involved the good faith of a party's intention, the Court said:

"These questions, for the want of, or notwithstanding the direct testimony of the parties to the transactions must have been peculiarly matters of probability to be determined by the conduct and acts of the parties and all the surrounding circumstances. Everything connected with the transactions between the parties calculated to throw any light upon the probable motives by which their conduct might be governed; everything tending to show the relations existing between them, and the feelings naturally likely to influence their action, in the absence of, or in conflict with the direct testimony on the subject, would be competent on the question of actual, bona fide intention."

Blodgett Paper Company vs. *Farmer,* 41 N. H., 398, 403.

"Persons of sound mind and discretion must in general be understood to intend, in the ordinary transactions of life, that which is the necessary and unavoidable consequences of their acts, and they are supposed to know what the consequences of their acts will be in such transactions."

Clifford, J. *Clarion Bank* vs. *Jones,* 21 Wall., 337.

"A party cannot avoid the legal consequences of his acts by protesting at the time he does them that he does not intend to subject himself to such consequences."

White, J. *U. S.* vs. *Lamont,* 155 U. S., 310.

In *Babcock* vs. *Eckler,* the rule is stated thus:

"If the necessary consequence of a conceded transaction was a defrauding of another, then, as a party must be presumed to have foreseen and intended the necessary consequence of his own act, the transaction itself is conclusive evidence of a fraudulent intent: for a party cannot be permitted to say that he did not intend the necessary consequence of his own voluntary act. Intent or intention is an emotion or operation of the mind, and can usually be shown by acts or declarations, and, as acts speak louder than words, if a party does an act which must defraud another, his declaring

that he did not by the act intend to defraud, is weighed down by the evidence of his own act."

So in *The Telegraph* vs. *Lee, supra,* the Court said:

"Perhaps Mr. Lee did not intend to perpetrate a fraud on the corporation, but the result of his acts had that effect, and he cannot be permitted to profit thereby."

Per Sherwin, J., at p. 366, citing cases.

So in *Bramblet* vs. *Com. Land Co., supra,* speaking of a corporation president, the Court said:

"Whether the derelict officer acts from a mistaken notion of his rights, or from an actually fraudulent purpose, is immaterial, as affecting the invalidity of the transaction."

P. 602.

"The evidence in this case convinces me that the defendant's conduct in respect to the affairs of the companies involved in this controversy has not been actuated by any wrongful motive. It is clear that he, more than any one else, has given much of his time and labor to the building up of the plaintiff corporation and its constituent companies. Such has been his position as their most active and trusted manager and officer that it is perhaps only natural that he should have grown to believe that they should cheerfully allow him to have a controlling interest in all their affairs and in their respective properties. While he may be right in this

belief, the methods adopted to carry it into effect have not been such as the law will sanction. The defendant has lost sight of the fact that as an officer and director he is bound by the strict rules of conduct laid down by the law in its wisdom for the guidance of a trustee and for the sure protection of the *cestui que* trust. Judgment for the plaintiff."

United Mines, etc., Co. vs. *Smith,* 90 N. Y. S., 204.

And, not to multiply quotations, it was said in *Thomas* vs. *Sweet, supra*:

"We are not prepared to say that such a contract as that entered into by Sweet, Huidekoper, and the Birmingham Iron Foundry is inherently vicious, nor is it necessary for the purpose of this opinion to vigorously denounce it; for even were it free from all shadow of suspicion, or the taint of fraud, if Sweet, in a secret manner, took advantage of it to buy the claims against the company at a large discount, with the funds of the company then in his hands as its treasurer, and recovered a judgment against the company for the full face value of the claims so purchased, with interest, he violated his trust, and every rule of justice, and every dictate of common honesty. There is a distinct allegation in the petition that the knowledge of the agreement, and the subsequent action of Sweet by virtue of it, did not come to the plaintiff in error until long after the rendition of the decree in the Huidekoper action, and

within two years before the commencement of this action. It may be that this allegation of itself is sufficient for the purpose of the pleading; but when it is strengthened by the nature of the facts alleged, and the very great probabilities of the situation, it seems but right to give a party who claims to have been greatly injured by reason of gross violations of ordinary trust and confidence an opportunity to prove the facts as charged. We think, with the exception of this comparatively recent and remarkable transaction, the contention of the defendant in error that the plaintiff in error in this action has been guilty of laches, is sufficiently sustained so as to banish from the consideration of the case all the other statements of causes of action against Sweet. But with respect to this one it has been so often declared by the courts—the rule is such a familiar one—that the law will not permit the officers of a corporation to so manage its affairs as to result to their private and personal advantage, that it is within the common knowledge of the great body of the people of this country. They must use every honorable means to enhance the general interest of the corporation for the special advantage of the stockholders and creditors. They are universally held to the highest measure of duty, and the most scrupulous good faith in their transactions with the business of the corporation. So rigid is the rule that no one acting in the capacity of a trustee can derive any benefit from the care, control, management, or investment of trust funds, that it is applied by all

courts without exception, and without any relaxation whatever."

And the reason for this rule is so well understood that it will suffice to refer to the following brief excerpt from a New Hampshire case, *tempore Parker, C. J.*:

"It is rarely the case that fraudulent sales of property can be shown by direct testimony. Pretended transfers of property are always made with the forms of a real sale, and evidence is always ready to show a due execution of bills of sale, and a delivery of the property. This evidence it is necessary to rebut, and it can only be done by showing various circumstances in the control and management of such property, and the situation and means of the parties; their previous dealings with and knowledge of each other; and, in certain cases, the dealings of the vendor with others as to other property, at or about the same time, even without the knowledge of the vendee."

Blake vs. *White,* 13 N. H., 267, 271.

And as Mr. Justice Bradley said:

"It is insisted that the proceedings were all conducted according to the forms of law. Very likely. Some of the most atrocious frauds are committed in that way. Indeed, the greater the fraud intended, the more particular the parties to it often are to proceed according to the strictest forms of law."

Graffam vs. *Burgess,* 117 U. S., 180, 186.

Hence, the liberality of the rules of evidence:

> "To establish fraud, it is not necessary to prove it by direct and positive evidence. Circumstantial evidence is not only sufficient, but in most cases it is the only proof that can be adduced."

Bradley, J. *Rea* vs. *Missouri,* 17 Wall., 543.

The authorities fully recognize the value of the probabilities in a cause; and as a consequence, the modern test of relevancy is liberality itself, particularly in causes depending upon circumstantial evidence.

> "As has been frequently said, great latitude is allowed in the reception of circumstantial evidence, the aid of which is constantly required, and therefore, where direct evidence of the fact is wanting, the more the jury can see of the surrounding facts and circumstances, the more correct their judgment is likely to be. The competency of a collateral fact to be used as the basis of legitimate argument is not to be determined by the conclusiveness of the inference it may afford in reference to the litigated fact. It is enough if these may tend, even in a slight degree, to elucidate the inquiry, or to assist, though remotely, to a determination probably founded in truth. The modern tendency, both of legislation and of the decisions of the courts, is to give as wide a scope as possible to the investigation of facts.

Courts of error are especially unwilling to reverse cases because unimportant and possibly irrelevant testimony may have crept in, unless there is reason to think that practical injustice has been thereby caused."

Holmes vs. *Goldsmith,* 147 U. S., 150, 164.

Remarking upon the relativity of facts, Greenleaf observes:

"The affairs of men consist of a complication of circumstances so intimately interwoven as to be hardly separable from each other. Each owes its birth to some preceding circumstance, and, in its turn, becomes the prolific parent of others; and each, during its existence, has its inseparable attributes and kindred facts, materially affecting its character, and essential to be known in order to a right understanding of its nature."

1 *Greenleaf, Evidence,* 16th Ed., Sec. 108.

Speaking of moral coincidences, a learned Court said:

"Whenever the necessity arises for a resort to circumstantial evidence, either from the nature of the inquiry, or the failure of direct proof, objections to testimony on the ground of irrelevancy are not favored, for the reason that the force and effect of circumstantial facts usually and almost necessarily depend upon their connection with each other; and circumstances altogether inconclusive

if separately considered, may, by their number and joint operation, especially when corroborated by moral coincidences, be sufficient to constitute conclusive proof."

Continental Ins. Co. vs. *Ins. Co. of Penn.,* 51 Fed., 884, 887.

Speaking of antecedent probabilities, the law upon the subject is thus summed up by the Supreme Court of Indiana:

"It is a rule of elementary logic, as well as of rudimentary law, that evidence which tends to establish facts rendering it antecedently probable that a given event will occur, is of material relevancy and strong probative force."

State vs. Marvin, 95 Ind., 465; and see, also *Rugg* vs. *Rohrbach,* 110 Ill. App., 532.

And these views are supported by our own courts:

"The tendency of modern decisions is to admit any evidence which may have a tendency to illustrate or throw any light on the transaction in controversy, or give any weight in determining the issue, leaving the strength of such tendency or the amount of such weight to be determined by the jury; and in determining the relevancy of evidence that may be offered upon an issue of fact much depends upon the nature of the issue to sustain which or against which it is offered, and a wide discretion is left to the trial judge in determining

whether it is admissible or not. Mr. Thayer, in the introduction to his *'Cases on Evidence'* says: 'No precise or universal test of relevancy is furnished by the law. The question must be determined in each case according to the teachings of reason and judicial experience'; and Mr. Stephen in his *'Digest of the Law of Evidence,'* says (Chapter 1): 'The word relevant means that any two facts to which it is applied are so related to each other that, according to the common course of events, the one, either taken by itself or in connection with other facts, proves or renders probable the past, present or future existence or non-existence of the other.' . . . Probability is an element which addresses itself to the reason, and is frequently invoked in matters of human conduct and experience for determining the existence or non-existence of a fact. In civil cases, a jury is authorized to determine an issue of fact as its probability or improbability may appear to them from the evidence before them. Hence, any evidence tending to show either of these conditions is relevant to the issue to be determined by them. 'If the evidence offered conduces in any reasonable degree to establish the probability or improbability of the fact in controversy, it should go to the jury.' "

Moody vs. Pierano, 4 Cal. App., 411, 418, 420.

The Right to Draw Inferences:

An inference is a conclusion drawn of the existence of one fact from others proved.

16 *Ency. Law,* 2nd Ed., 317.

It is thus described in the California Code:

C. C. P., Sec. 1958, 1960.

That ultimate facts may be determined by inferences, is thoroughly well settled.

Gates vs. *Hughes,* 44 Wisc., 336;
Blanton vs. *Dold,* 109 Mo., 64, 75;
Supreme Tent vs. *King,* 142 Fed., 678, 681;
Shafter vs. *Evans,* 53 Cal., 32;
Chidesfer vs. *Cons. Ditch Co.,* 59 Id., 197, 201-2;
People vs. *Walden,* 51 Id., 588;
Stone vs. *Mg. Co.,* 52 Id., 315;
People vs. *Carillo,* 54 Id., 64.

In criminal causes, inferential evidence is constantly resorted to, even to establish the *corpus delecti;* and in all classes of civil causes, especially in cases of fraud, its utility and necessity have been frequently recognized. Thus, in a familiar California case, in the course of an opinion holding that subsequent facts may be utilized to establish an antecedent fraud, the Court said:

> "The proofs in cases of fraud are usually circumstantial: frauds are a species of the *crimen falsi,* which, like larceny, are not done openly. They are usually shown as inferences from facts established, rather than as facts expressly proven."

Butler vs. *Collins,* 12 Cal., 457, 464.

"It is well settled that if the evidence offered conduces in any reasonable degree to establish the probability or improbability of the fact in controversy, it should go to the jury. It would be a narrow rule, and not conducive to the ends of justice, to exclude it on the ground that it did not afford full proof of the non-existence of the disputed fact. Besides presumptive evidence proceeds on the theory that the jury can infer the existence of a fact from another fact that is proved, and most usually accompanies it. Many of the affairs of human life are determined in courts of justice in this way, and experience has proved that juries, under the direction of a wise judge, do not often err in the reasoning which leads them to a proper conclusion on such evidence. And if they should happen to reach a wrong conclusion, the court has in its own hands the mode and measure of redress."

Davis, J. *Home Ins. Co.* vs. *Weide,* 11 Wall., 440.

"Inferences from circumstantial facts may frequently amount to full proof of a given theory, and may even be strong enough to overcome the force and effect of direct testimony to the contrary."

Clifford, J. *The Wenona,* 19 Wall., 58.

"As has been frequently said, great latitude is

allowed in the reception of circumstantial evidence, the aid of which is constantly required, and, therefore, where direct evidence of the fact is wanting, the more the jury can see of the surrounding facts and circumstances the more correct their judgment is likely to be."

Shiras, J. *Holmes* vs. *Goldsmith,* 147 U. S., 164.

"Whenever the necessity arises for a resort to circumstantial evidence, either from the nature of the inquiry or the failure of direct proof, objections to testimony on the ground of irrelevancy are not favored, for the reason that the force and effect of circumstantial facts usually and almost necessarily depend upon their connection with each other. Circumstances altogether inconclusive, if separately considered, may, by their number and joint operation, especially when corroborated by moral coincidences, be sufficient to constitute conclusive proof."

Clifford, J. *Castle* vs. *Bullard,* 23 How., 187.

"Experience shows that positive proof of fraudulent acts is not generally to be expected, and for that reason, among others, the law allows a resort to circumstances, as the means of ascertaining the truth."

Clifford, J. *Castle* vs. *Bullard,* 23 How., 187.

Upon the oral argument, it was conceded to be correct that the Court may utilize inferences for the pur-

pose of determining what was in the minds of the parties during the transaction in question, but it was contended that the presumption of good faith prevailed over that of fraud. We respectfully insist, however, in view of the evidence, both oral and documentary which has been presented in this case, that it would be fallacy to attribute an artificial probative force to any presumption. The truth of the matter is that a presumption operates only in the absence of evidence: where there is evidence before the Court, presumptions have no place; and to quote the language of the Circuit Court of Appeals for the Ninth Circuit:

> "Where there is evidence, . . . the case should be determined upon the evidence, and not upon a presumption that arises only in the absence of all evidence."

Los Angeles Traction Co. vs. *Conneally,* 136 Fed., 104, 108;
and see, further, in illustration of this remark:
4 *Wigmore on Evidence,* Sec. 2491;
Owsley vs. *Owsley,* 77 S. W. (Ky.), 394, 397;
Hill vs. *Chambers,* 30 Mich., 422, 428-9;
Whiton vs. *Snyder,* 88 N. Y., 299;
Cummings vs. *O'Brien,* 122 Cal., 204, 206.

Mode of Drawing Inferences:

Not only, then, should a judge infer facts from the

evidence produced, but, in drawing his inferences, he is not hide-bound, and especially where the indirect processes of fraud are concerned, he may receive all the light which may be shed upon the evidence by his common sense and knowledge and experience of men, motives, passions, propensities, and selfishness.

> "In deciding disputes between litigant parties, where witnesses are naturally apt to state facts strongly in favor of their respective principals, the jury well may, and, in fact, must use their own knowledge and experience in the ordinary affairs of life to enable them to see where is the truth."
>
> Shiras, J. *Jacksonville, etc., R. Co.* vs. *Hooper,* 160 U. S., 530.

> "In this (the difficulty of fathoming men's motives) the Court can only rely on the judgment and experience of juries."
>
> Johnson, J. *Patapsco Ins. Co.* vs. *Coulter,* 3 Pet., 238.

This right of a jury to weigh evidence and dissect motives in the light of their knowledge and experience in life and of the usual springs of human action, is fully recognized in a well considered case in the Supreme Court. In that case, the lower court told the jury:

> "It is your duty to come to a conclusion upon all those facts, *and the effect of all those facts,*

the same as you would conscientiously come to a conclusion upon any other set of facts that would come before you in life. There is no technical rule: there is no limitation in courts of justice that prevent you from applying to them (the facts and circumstances in evidence) just the same rules of good common sense, subject, always, of course, to a conscientious exercise of that common sense, that you would apply to any other subject that came under your consideration and that demanded your judgment."

These instructions were attacked; and in approving them, the Court, through Mr. Justice Brown, said:

"There was no error in these instructions. One of the main objects of a jury trial is to secure to parties the judgment of twelve men of average intelligence, who will bring to bear upon the consideration of the case the sound common sense which is supposed to characterize their ordinary daily transactions. If cases were to be decided alone by the application of technical rules of law and evidence, it could better be done by men who are learned in the law and who have made it the study of their lives; and while it is entirely true that the jury are bound to receive the law from the Court, and to be guided by its instructions, it by no means follows that they are to abdicate their common sense, or to adopt any different processes of reasoning from those which guide them in the most important matters which concern themselves. Their sound common sense brought to

bear upon the consideration of testimony, and in obedience to the rules laid down by the Court, is the most valuable feature of the jury system, and has done more to preserve its popularity than any apprehension that a bench of judges will wilfully misuse their power. To construe these instructions as authorizing the jury to depart from the rules of evidence and to decide the case upon abstract notions of their own, or from facts gathered outside of the testimony, is hypercritical. They are simply told to come to a conclusion upon the facts that had been proven, and to apply to those facts the same rules of good sense that they would apply to any other subject that came under their consideration and demanded their judgment. In these remarks the Court gave a just and accurate definition of their functions. It certainly would have been error to have told them to apply to the facts proven any other rules than those which their good common sense dictated, or to set up any other standard of judgment than that which influenced them in the ordinary business of life."

Dunlop vs. *U. S.,* 165 U. S., 486, 499-500.

"The natural instinct which leads men in their sober senses to avoid injury and preserve life, is an element of evidence. In all questions touching the conduct of men, motives, feeling and natural instincts are allowed to have their weight, and to constitute evidence for the consideration of courts and juries."

Allen vs. *Willard,* 57 Pa. St., 374, 380.

"It was the province of the jury to weigh the testimony of the attorneys as to the value of the services by reference to their nature, the time occupied in their performance and other attendant circumstances, and by applying to it their own experience and knowledge of the character of such services. . . . Other persons besides professional men have knowledge of the value of professional services; and while great weight should always be given to the opinions of those familiar with the subject, they are not to be blindly received, but are to be intelligently examined by the jury in the light of their own general knowledge; they should control only as they are known to be reasonable."

Head vs. *Hargrave,* 105 U. S., 45, 49, 50.

"It is proper for the jury to apply to the facts proved, their general knowledge as intelligent business men. They must test the truth and weight of evidence, and what it proves, by their knowledge and judgment derived from experience, observation and reflection."

Kitzinger vs. *Sanborn,* 70 Ill., 146, 149.

The following is the entire opinion:

"Bleckley, C. J. This case presents no legal question, simply a question of fact; and we dispose of it in this brief summary as a complete opinion. The credit of witnesses is for the jury. If the jury believe the plaintiff's witnesses, the

verdict was not without evidence to support it. In construing and applying testimony, reasonable inferences and deductions may be made, and conclusions may be reached that lie quite beyond the mere letter of the evidence. Judgment affirmed."

White vs. *Hammond,* 4 S. E. (Ga.), 102.

"The defendant also excepted to the statement in the 7th instruction as given, that the jury, in determining the questions of fact upon the evidence before them, might apply their own practical knowledge upon such subjects. There was no error in this. It did not permit them to rely upon facts not in evidence, or to decide the matters at issue upon their own private knowledge, but simply as men of affairs to judge of the questions of fact in issue in the light of their own experience."

Johnson vs. *Hillstrom,* 33 N. W. (Minn.), 547, 548.

"It is certainly competent for the jury to use their knowledge of human nature and of the customs of society in their efforts to interpret conduct, and judge of its indications."

O'Neill vs. *State,* 11 S. E. (Ga.), 856, 858.

In this case the Court among other things instructed the jury as follows:

"You may also in considering whom you will

or will not believe take into account your experience and relations among men."

In overruling the objection of appellant to this instruction, the Court said:

"Juries should be and as a rule are selected because of their extensive experience among men. The school of experience which men attend in their varied relations among men imparts a keenness of mental vision which enables them the more readily to see the motives and to judge of the selfish or unselfish interests of men. This education, be it much or little, is a part of the juror, and should not, if possible, be laid aside in passing upon the inducements which may surround a witness to speak falsely. It is this education which to a great extent enables a juror to discover in the faltering manner or the downcast eye whether the statement of the witness was made in modesty or in guilty falsehood. The value of experience is not to be given up when the man becomes a juror, and is required to apply the tests of credit to the heart and mind of the witness, but whatever qualification that experience gives should be employed to the end that the whole truth may be known and acted upon."

Jenney Electric Company vs. *Brannan,* 41 N. E. (Ind)., 448, 450, 451.

"It would result in the confusion of the mind of a juror if told that he must not allow his judgment as a man to be mixed up with his judgment

as a juror. The duties of a juror in no manner transform him. It is upon the theory that he continues to be a man, though a juror, that he is rendered capable of construing evidence."

People vs. *Ammerman,* 118 Cal., 23, 30.

In this case the Supreme Court quoted with approval the following passage from the opinion of Mr. Justice Field in *Head* vs. *Hargrave,* 105 U. S., 45:

"So far from laying aside their own general knowledge and ideas, the jury should have applied that knowledge and those ideas to the matters of fact in evidence in determining the weight to be given to the opinions expressed, and it was only in that way that they could arrive at a just conclusion. While they cannot act in any case upon particular facts material to its disposition resting in their private knowledge, but should be governed by the evidence adduced, they may, and to act intelligently they must, judge of the weight and force of that evidence by their own general knowledge of the subject of inquiry."

And in this same opinion, the Supreme Court of Kansas quoted with approval the following language of Chief Justice Shaw in *Patterson* vs. *Boston,* 20 Pick., 166:

"Juries would be very little fit for the high and responsible office to which they are called, especially to make an appraisement, if they might not avail themselves of those powers of their minds

when they are most necessary to the performance of their duties."

And also the following language of Chief Justice Shaw from *Murdock* vs. *Sumner,* 22 Pick., 158:

"The jury very properly exercise their own judgment, and apply their own knowledge and experience, in regard to the general subject of inquiry."

Chicago, etc., Railway vs. *Drake,* 26 Pac. (Kansas), 1039.

And finally, it is observed by the Supreme Court of New York:

"The quite modern solemn saying that fraud cannot be presumed but must be proved is made much of. It has done much duty in its time to prevent judgments of fraud, without its being always perceived that it is a rather solemn absurdity. Of course fraud must be proved and cannot be presumed, but so must the price of a cow or pig, and it cannot be presumed. A solemn and wise statement of the former is quite as absurd as a like statement of the latter. The rule is that no fact may be presumed but must be proved, and fraud is founded on sufficient evidence and the deductions therefrom the same as another fact."

Tyrrell vs. *City of New York,* 94 N. Y. S., 951, 953.

From the bearing and significance of these rules,—

and these rules are the outgrowth of judicial experience,—it must be plain that it would be hopeless to expect any display or open avowal of ulterior purposes by parties seeking unconscionable advantages over others: on the contrary, their constant effort and aim would be, if not fully to cover up, at least to mask, their real intentions.

With these rules in mind, let us look at the situation presented on March 25-26, 1908.

A. *The Utility of Probabilities, Antecedent and Subsequent.*

Mr. Herbert Spencer, the great thinker who so recently departed, has told us something of the relativity of knowledge: but experience teaches that there is a relativity of facts as well. An isolated fact can scarcely be imagined: for facts are related like men, both antecedently and subsequently; and there is in all human situations, a train or sequence in the facts that make them up. While every transaction creates new relations, yet it is itself the birth or product of antecedent circumstances: it is this consideration which assists us to see in what goes before, the preparation or seed of what is to follow after; and hence the utility of considering circumstances, both antecedent, contemporaneous and subsequent, which make probable a given or claimed consequence.

Views of Greenleaf:

"The affairs of men consist of a complication of circumstances so intimately interwoven as to be hardly separable from each other. Each owes its birth to some preceding circumstance, and, in its turn, becomes the prolific parent of others; and each, during its existence, has its inseparable attributes and kindred facts, materially affecting its character, and essential to be known in order to a right understanding of its nature."

1 *Greenleaf, Evidence,* 16th Ed., Sec. 108.

Views of Harrison, J.:

"Probability is an element which addresses itself to the reason, and is frequently invoked in matters of human conduct and experience for determining the existence or non-existence of a fact. In civil cases, a jury is authorized to determine an issue of fact as its probability or improbability may appear to them from the evidence before them. Hence, any evidence tending to show either of these conditions is relevant to the issue to be determined by them. 'If the evidence offered conduces in any reasonable degree to establish the probability or improbability of the fact in controversy, it should go to the jury.'"

Moody vs. *Pierano,* 4 Cal. App., 411, 418, 420.

In other words, the transaction in question here should be considered in its actual setting at the time of its occurrence.

B. *The Sequence of Historical Events up to March 25-26, 1908.*

We have:

The incorporation of the various cement companies.
The Howard Sales Agency Companies, and their intimate relations with the cement companies.
The organization of the N. W. Co.
The intimate relations of Howard, Evans and Dingee with the launching of the N. W. Co.
The bond issue of the N. W. Co. and its purpose.
The unlawful diversion by Dingee of funds of the N. W. Co. derived from the sale of its bonds.
The cessation of operations at Kendall.
The collapse and failure of the N. W. Co. to develop its enterprise.
Evans' unanswered letters to Dingee.
Evans' consequent anxiety and dissatisfaction.
The Wenzelburger investigation.
The disclosure of Dingee's wrongdoing.
Evans' consequent trepidation and fear for his money, and his threats. Indeed, upon the Oral Argument, it was conceded that Evans was very much agitated, dissatisfied and complaining.
Communication of Evans' state of mind by Howard to Dingee, and the latter's consequent anxiety to get Evans off his back.
Evans' significant subsequent conduct: his visit to San Francisco as soon as he could, and his conferences with Smith and with Howard.

In other words, we have here the old story of Invest-

ment; Failure of the Enterprise to make good: Investigation; Disclosure of Wrongdoing by a Fiduciary; anxiety of that Fiduciary; and Determination to get back the money invested. Here, we have precisely the conditions fit for generating a second breach of trust by that fiduciary, in order to get the malcontent off his back.

And through all this, the Standard stood apart, wholly independent of any connection with the N. W. Co.: and it never was brought into the mess until the fiduciary, to save himself, sacrificed it to the malcontent N. W. bondholder.

C. *The Position and Assets of the N. W. Co. on March 25-26, 1908.*

This matter has already been discussed. It is enough now to say that the enterprise was a failure: that all that was done up to March 25-26, 1908, was to organize the Company, declare a bond issue, sell bonds, divert proceeds, and make no progress at Kendall. And all of this was thoroughly well known to all concerned. The total amount expended at Kendall was a bagatelle: even the machinery and tools were shipped away; and all that was left behind was a hole in the ground in which to bury the Company and its evil memories of failure, spoliation and embezzlement.

And Evans can not dispute these wretched conditions: he does not dispute them; and in his deposition,

after confessing to suspicions in January, 1908, he adds:

> "Of course, I was under the impression that $700,000 had actually been put up on the sale of bonds, and as I knew that practically only a little more than $20,000 had been actually expended, there should have been, of course, a lot of money left."
>
> Record, Vol. I, p. 178.

And all the while, he knew the purpose of the N. W. Co. bond issue.

D. *Relations between Evans and Howard.*

These relations were of the closest and most intimate character: this record everywhere reveals a complete community of interest, feeling and sympathy between them.

Evans and Howard.

1. Acquainted a good many years: Record, Vol. I, p. 133.
2. Relations friendly: Record, Vol. I, p. 177.
3. Evans' firm was authorized agent for B. G. Co. with whom Howard was very intimate: Record, Vol. I, p. 124, 126.
4. Evans' firm held shares in the W. F. Co.: Record, Vol. I, p. 124.

Shareholders for $18,100: Record, Vol. I, p. 126.

Howard was executive head of W. F. Co.: Record, Vol. I, p. 126.

5. Evans' firm was agent for W. F. Co.: Record, Vol. I, p. 133, 212, 214.

6. Evans' firm never gave up its holdings in the W. F. Co.: Record, Vol. I, p. 127.

7. The W. F. Co. acted for Evans in the Wenzelburger Investigation: Record, Vol. I, p. 186.

8. Evans had "absolute confidence" in the W. F. Co.: Record, Vol. I, p. 224.

9. Evans and Howard were jointly interested: Record, Vol. I, p. 212; Record, Vol. II, p. 402-3.

10. They were jointly interested and closely associated: Record, Vol. I, p. 212, 181.

11. They were so chummy that onlookers described them as having "hobnobbed" together: Record, Vol. II, p. 460, 498.

And according to the Century Dictionary, "hobnob" conveys the idea of intimate familiarity.

12. Evans showed courtesies to Howard: Record, Vol. II, p. 373.

13. Evans' disbursements ($2664.76) looked after by Howard: So, early disbursements.

14. Evans' "efforts" for Howard's "associates." He regarded Dingee and Bachman as Howard's associates: Record, Vol. II, p. 511.

He was familiar with their doings: Record, Vol. II, p. 394.

He wilfully misleads for them: Record, Vol. II, p. 400, 401.

And he keeps it up: Record, Vol. II, p. 413.

His secretiveness: Record, Vol. II, p. 413, 461.

15. Evans' solicitude for Howard:

In re S. F. disaster: Record, Vol. II, p. 353.

In re Howard's convenience in traveling: Record, Vol. II, p. 375.

In re consultation with Howard's attorney: Record, Vol. II, p. 389.

In re Howard's 80 acres: Record, Vol. II, p. 398.

16. Evans reposed such confidence in Howard that he put himself into Howard's hands: Record, Vol. II, p. 476.

17. Evans' absurd attempt to screen Howard by trying to deny Howard's connection with the floating of the N. W. Co.: Record, Vol. I, p. 127-8.

And this, if you please, from the author of this correspondence and other evidence showing his knowledge of Howard's connection with the enterprise from the beginning.

18. Evans consulted Howard, not Smith, as to the interest on the so-called Standard notes, and sent the notes to Howard for collection, not to Smith; and he tells Howard to select some

solicitor, overlooking Smith: Record, Vol. I, p. 194.

19. Evans' familiarity with Howard's "trials and and tribulations": Record, Vol. I, p. 170.

And this spirit by Evans toward Howard was fully reciprocated by Howard toward Evans:

Howard and Evans.

20. Confidential letters between them.
    Correspondence passim.
    Sample: Record, Vol. II, p. 361, 359-360, 383, 472.
21. Howard calls Evans "Ernest": Record, Vol. II, p. 505, 506.
22. Howard extends his affection to Percy Evans also: Record, Vol. II, p. 508.
    Calls him "Percy": Record, Vol. II, p. 508, 545, 547.
23. Howard stops over night at "Ernest's" house.
24. Howard pays interest for Evans: Record, Vol. II, p. 503-4.
25. Howard and Evans agree to post each other as far as they consistently can: Record, Vol. II, p. 368-9.
    And Howard kept himself posted.
    Evans knew all that Howard knew.
26. Howard discriminates Evans' shares for him: Record, Vol. II, p. 498-9.
27. Howard and Evans agreed that Howard, Dingee and Bachman were under "obligations" to Evans: Record, Vol. II, p. 385, 393, 504.

28. Howard's benevolent purposes as to Evans:
    N. W. Co. promotion profits: Record, Vol. II, p. 467.
    N. W. Co. promotion profits: Record, Vol. II, p. 488.

29. Howard's "efforts" for Evans:
    Would do his best to get for Evans out of N. W. Co. promotion profits $50,000 additional: Howard, Record, Vol. II, p. 480.
    Wanted Dingee and Bachman to recognize Evans' work: Howard, Record, Vol. II, p. 488.
    Would conceal Evans' extra bonus from Company: Record, Vol. II, p. 497.

E. *Summary as to Relations between Evans and Howard.*

This rapid, but not exhaustive, review of this record establishes the complete understanding and intimate relations between Evans and Howard: it shows the sympathy and community of interest that obtained between them; and it evinces the constant transmission of information from one to the other. The entire relation might well be summed up in the phrase that their interests were identical: Howard looked upon Evans' interest as his own: Howard would care for Evans' interests as his own; and Evans concurred in that declaration and position (Record, Vol. II, p. 490-1; 496).

F. *The Relations between Howard and Dingee and Bachman.*

But let us advance another step in this analysis of the situation on March 25-26, 1908. Having seen the relations between Evans and Howard, we now inquire into the relations between Howard and Dingee and Bachman; and here, again, we are confronted with relations of the most marked intimacy—precisely such relations as were peculiarly appropriate to permit the sequel complained of.

1. Howard knew Dingee quite well and for some time prior to 1908: since 1881.
2. Howard and Dingee often lunched together: Record, Vol. II, p. 405, 519.
   For 2 hours at a time: Record, Vol. II, p. 487.
3. Howard, Dingee and Bachman would also lunch together: Record, Vol. II, p. 488.
4. Howard and Dingee were in frequent conference: Record, Vol, I, p. 137, 141, 143-4, 148, 151, 154, 156-8, 169-170, 171.
5. Howard was familiar with Dingee's cement plans: Record, Vol. I, p. 128.
6. Howard acted for and represented Dingee in the north: Record, Vol. I, p. 128-132.
   Howard was Dingee's "valuable asset."
   And Dingee was "his nibs."
7. Howard and Dingee were interested in other enterprises aside from the Santa Cruz Co.,

the Standard Co., and the N. W. Co., namely:

Western Calcium Co.

B. B. & B. C. Ry.

Helped to place Santa Cruz bonds.

Eureka Slate Co.

8. Howard obtained railway privileges through Dingee: Record, Vol. II, p. 372-5.

9. Howard's personality was important in Dingee's eyes, Dingee being anxious to have and retain him as sales agent:

Letter of Feb. 17, 1908: Record, Vol. III, p. 725.

10. Howard entertained a high opinion of Bachman in the cement business: Record, Vol. II, p. 363.

11. Howard advised Bachman of his doings north, and of Evans' "latest news": Record, Vol. II, p. 383.

12. Howard transacted all of his cement business with Dingee or Bachman.

13. Howard was in close and confidential touch with Dingee as to B. B. & B. C. Ry. affairs: Record, Vol. II, p. 469,500.

Howard helped Dingee to acquire control.

He knew that Dingee "will control and influence two-thirds" of the stock: Record, Vol. II, p. 442.

He went into the road on Dingee's stock.

And note his subordination to Dingee: Letter of Jan. 28, 1907.

14. Howard was Dingee's "Statesman."

Other Pet Names:

"Valuable Asset."
"His Nibs."
"Grasshopper."
"Crowned Heads."

15. Howard, Dingee and Bachman were so close that Evans regarded them as "associates": Record, Vol. II, p. 511.

16. Howard acknowledged that he was "associated" with Dingee: Record, Vol. II, p. 386.

17. Howard acknowledged that his and Evans' interests were allied with the Dingee combination: Record, Vol. II, p. 409, 453, 459.

18. Howard's intimacy with Dingee emphasized:

Calls Dingee's attention to proposition of business adversary: Record, Vol. II, p. 436-7.

19. Howard's familiarity with Dingee's movements:

When Dingee would leave New York: Record, Vol. II, p. 384.

When Dingee was due in San Francisco: Record, Vol. II, p. 393, 397.

20. Howard's sense of responsibility as to land acquisition: Record, Vol. II, p. 462.

21. Howard and Dingee discussed the financial scheme of the N. W. Co.: Record, Vol. I, p. 154-5: Vol. II, p. 488, 512.

As far back as 1906.

So with Bachman: Record, Vol. II, p. 383-386.

22. Howard's compensation for his activity in assisting to launch the N. W. Co. was to be shares given him by Dingee: Record, Vol. I, p. 132-3.

23. Howard, Bachman and Dingee were to share "alike" in the promotion profits of the N. W. Co.: Record, Vol. II, p. 385.

24. Howard's intimacy and influence with Dingee and Bachman illustrated by the appointment of C. W. Howard as Washington agent of the N. W. Co.

    Wenzelburger's Report: Meeting of Sept. 26, 1906.

    Not a syllable about Howard.

    But we know what influence was at work: Record, Vol. II, p. 447.

Another Ilustration:

Banking: Record, Vol. III, p. 861-2: 857-8.

25. The shares that Howard got from Dingee were promotion shares of the N. W. Co.: Record, Vol. II, p. 543.

26. Howard felt that he, Dingee and Bachman were under "obligations" to Evans: Record, Vol. II, p. 385, 393, 504.

27. Howard communicated to Dingee and Bachman his benevolent intentions as to Evans: Record, Vol. I, p. 141.

28. Howard obtains "remuneration" for Evans from Dingee: Record, Vol. II, p. 520, 522.

29. Howard knew all about Evans' unanswered letters to Dingee: Record, Vol. I, p. 163-4.

30. Howard advised Dingee of the Evans' criminal liability letter, even sending it out to S. F. from N. Y.

31. Howard was selected by the malcontent bondholders as the man to interview Dingee in March, 1908: Record, passim.

32. Howard or his companions advanced Dingee money prior to May, 1908, and loaned him money as late as October, 1908: the advances began on March 28, 1908, immediately after the agreement of March 25/26, 1908.

33. Dingee gave Howard a power of attorney in re Panama Canal Cement Contract, on May 1, 1908—the date of the notes sued on here.

G. *Summary as to Relations between Howard and Dingee.*

Can any reasonable person, reading this record in the light of his experience of life and of human nature, doubt for a moment the intimacy between Howard and Dingee? And he was the exclusive selling agent for the output of Dingee's cement corporations: Dingee was under financial and business obligations to him: he had warned Dingee of the temper of the malcontent bondholders: and when he came to Dingee as agent for those bondholders, he had the special and personal motive to further the issuance of the notes arising from his recognition of that responsibility which he refers to in his letters. Taking all their relations together, was not Howard the man of all men

to dispatch upon that mission to Dingee designed to enable the bondholders to "get rid" of the bonds?

H. *Relations between Dingee and the Standard Corporation.*

We have seen how intimate were the relations between Evans and Howard: we have seen how intimate were the relations between Howard and Dingee: what, then, were the relations between Dingee and the Standard Corporation?

There is but one answer from all sides of the case, and that is the "unquestioned" dominance and control of Dingee over that corporation.

In view of the unquestioned and conceded hegemony of Dingee over the Standard Corporation, it may not be amiss to direct attention to the way in which courts of the highest authority regard a man in that position. Thus, it is observed by Judge Sanborn, one of the ablest of our Federal Judges:

> "The question which this case presents is: May the holder of the majority of the stock of a corporation make a sale to himself, unassailable in equity, of all the property of the corporation for its fair value, when he knows that the value is only five-sevenths of the amount which the corporation can obtain for it. It is not material to the determination of this issue whether the notice of the stockholders' meeting specified, or failed to state, that the question of the confirmation of the sale to Southworth would be there considered, or

whether or not the other proceedings of the defendants complied with the requirements of the law; and for the purposes of this decision it will be conceded, but it is not decided, that all the proceedings of the parties and of the corporation were in strict accordance with the forms of law. The objection to this sale lies deeper. It is that it was violative of the duty of a fiduciary.

"A corporation holds its property in trust for its stockholders. The stockholders have a joint interest in the same property and in the same title. Community of interest in a common property or title imposes a community of duty and a mutual obligation to do nothing to impair either. It creates such a fiducial relation as makes it inequitable for any of those who thus share in the common property to do anything to or with it for their own profit, to the detriment of others, who have the same rights. *Jackson* vs. *Ludeling,* 21 Wall., 616, 622; 22 L. Ed., 492; *Jones* vs. *Missouri Edison Electric Co.,* 144 Fed., 765, 771; 75 C. C. A., 631, 637; *Booker* vs. *Crocker,* 132 Fed., 7, 8, 65 C. C. A., 627, 628.

"The holder of the majority of the stock of a corporation has the power, by the election of biddable directors and by the vote of his stock, to do everything that the corporation can do. His power to control and direct the action of the corporation places him in its shoes, and constitutes him the actual, if not the technical, trustee for the holders of the minority of the stock. He draws to himself and uses all the powers of the corporation. In effect he holds an irrevocable power of attorney

from the minority stockholders to manage and to sell the property of the corporation, for himself and for them. Times, places, and notices of meetings of the directors and of meetings of stockholders become of secondary importance, because the presence, the vote, and the protest of holders of the minority of the stock are unavailing against the will of the holder of the majority. They can act and contract regarding the corporate property, they can preserve and protect their interests in it, only through him and through the courts.

"This devolution of unlimited power imposes on a single holder of the majority of the stock a correlative duty, the duty of a fiduciary or agent, to the holders of the minority of the stock, who can act only through him, the duty to exercise good faith, care, and diligence to make the property of the corporation produce the largest possible amount, to protect the interests of the holders of the minority of the stock, and to secure and pay over to them their just proportion of the income and of the proceeds of the corporate property. Any sale of the property of the corporation by him to himself for less than he could obtain for it from another, or any other act in his interest to the detriment of the holders of the minority of the stock, becomes a breach of duty and of trust, renders the sale or act voidable at the election of the minority stockholders, and invokes plenary relief from a court of chancery."

Wheeler vs. *Building Co.,* 159 Fed. Rep., 391, 393-4.

And apropos of Judge Sanborn's views, it may be said that the general precautions taken by the legislature in framing its scheme of corporate regulation, presupposes a more or less general distribution of stock and corporate control, and an equalization of influence in the corporate management: but when one man holds the corporation and its fortunes in the hollow of his hand, all that is changed and goes for naught, and we are then confronted with all the evils of boss rule. This may well be illustrated by a proceeding which involved Addicks, formerly a political boss in the State of New Jersey. Addicks undertook to treat his corporations much as Dingee treated the corporations under his control: the result was that he was brought before a Chancellor; and the very full understanding and instruction of the Chancellor will be found reported in *Pepper* vs. *Addicks,* 153 Fed. Rep., 383. It will be remembered that Mr. McGary, who was one of Dingee's puppets upon the directorate of the Standard Corporation, testified that in the transaction of the corporate business he carried out the views or policies of Dingee, and acted at Dingee's dictation, and that this subordination of himself to Dingee was true of the so-called special meeting of May 5, 1908. Bearing this testimony in mind, we find that in *Pepper* vs. *Addicks,* the Court held that where the defendant, an officer and director of a corporation, absolutely dominates its Board of Directors and induced such Board to authorize the purchase of worth-

less bonds of other corporations in which he was interested, by which he was enabled to make a large individual profit, he was liable to account to the corporation's receiver for the profit so made; and the Court put considerable stress upon the fact that the defendant did dominate the directorate of the corporation; and in referring to that matter on page 397 of the report the Court observes that "He elected his own friends and associates as directors and officers, and they did whatever he asked them to do,"—a passage of which the testimony of Mr. McGary in the cause at bar is a sheer echo. And on page 403 of the report, the Court observes:

> "As it seems to me, the evidence proves overwhelmingly that the defendant was the absolute master in fact of the corporation, that his personality was dominant in all its affairs of every kind, that he dictated the personnel of its officers without contest or contradiction, and that the board of directors and the other officers were content merely to register his will. If he had owned the entire capital stock of the company—save the necessary qualifying shares—he could not have controlled it more completely. In short, the defendant and the Delaware Company were essentially identical, and the corporate machinery was merely used for the purpose of executing his plans under the guise of carrying out a formal corporate determination."

And later on in the same opinion, after referring to the authorities, the learned Judge said:

"As it seems to me, the defendant is in the position condemned by these authorities. He was an officer of the Delaware Company, and used his position as president and director to advance his own interests at the expense of the corporation. Of course, if he had put his hand into the treasury of the Delaware Company and had physically withdrawn for his own profit the money which the Company had lost, no one would question his liability. Neither would it be questioned, if he had conspired with a majority of the board to do the acts and pass the resolutions that have been done and passed, whereby the same result should be accomplished as by the coarser method of corporeal abstraction. And I see no reason why his liability should be doubted because the means actually adopted were different in kind, but were equally efficacious to transfer the property of the corporation to his personal use and profit. His control of the board was as complete as if they and he had been in collusion to accomplish a common object; and, with this uncontested power in his hands, he was the more bound to the utmost good faith and fair dealing. As has been shown, I think, he was absolutely unchecked by his fellow officers and directors. They looked to him, and to him alone, for information and advice. What he gave them was accepted without the slightest question or suspicion, and his wishes were carried into effect promptly and without change. No one can read the testimony without being convinced that real discussion in the board, or the exercise of individual judgment, was unknown. The directors and

officers were either careless or ignorant to an almost incredible degree, and were apparently content to draw their satisfactory salaries and clothe his requests or suggestions in the formal garb of corporate action."

Pepper vs. *Addicks,* 153 Fed., 383, 397, 403, 406-7.

I. *The Position of Dingee in March, 1908.*

Bearing in mind, then, the situation and surroundings of the N. W. Co.: bearing in mind its failure to develop its enterprise, and the reasons therefor, and consequences thereof: bearing in mind the relations between Evans and Howard, and Howard and Dingee, and Dingee and the Standard Corporation,—what was Dingee's actual situation in March, 1908?

1. A Fiduciary. He was an officer of the N. W. Co., of the Santa Cruz Co., and of the Standard Co.: he was their fiduciary; and his duties and obligations as such were thoroughly well defined by law; and his position as such fiduciary gave him no more right, merely because he possessed control, to obligate the Standard to meet consequences flowing from his own wrong doing in the affairs of the N. W. Co., than it gave him *sua sponte* to pledge the B. B. & B. C. Ry. stock to the American Bridge Co. for a debt of the Santa Cruz Co., or to ship the tools to Santa Cruz, or

to divert and misappropriate the funds of the N. W. Co.

Civil Code, Sec. 2228, *et seq.,* 2322 Subd. 3;
Stevens vs. *Gall,* 179 Fed., 938;
Trice vs. *Comstock,* 121 Fed., 620, 622-3, 626-7;
Giebler Mfg. Co. vs. *Krannenberg,* 92 N. Y. S., 843;
Worthington vs. *Worthington,* 91 Id., 443;
Baker vs. *Ducker,* 79 Cal., 365.

Dingee was in control of these corporations: he was their fiduciary in the highest sense; and in any transaction which involved these Howard bondholders, the N. W. Co., the Standard Corporation, and consequences flowing from Dingee's unlawful diversion of proceeds of the N. W. Co. bond issue, and from his failure to establish the heralded plant at Kendall, upon their faith in the establishment of which plant these bondholders had invested, Dingee acted in a double capacity,—personally and individually, and also as a fiduciary for these corporations. But if, by reason of the position taken by the Howard bondholders, plus Evans' references to the criminal law, plus his own desperate financial condition, plus his own consciousness of corporate wrong doing, plus his control over the Standard, he sacrificed the Standard to his personal interest, treated it as his very chattel, imposed upon it the worthless bonds of a rank and odorous failure,

and shifted to it a burden which he should have borne; and if he did this fraudulent and inequitable thing with the knowledge, connivance and participation of these Howard bondholders, who themselves had a strong financial and personal motive to urge and help him to do it,—then it would be an everlasting reproach to equity, if, when those who profited by that deal came before a chancellor to realize the fruits of the deal, the chancellor did not thrust them forth as unclean things.

2. *A Financial Wreck.*

Can there be any reasonable doubt that, in March, 1908, Dingee's financial condition was wholly desperate—that his back was against the wall?

Record, Vol. I, p. 189-190; Vol. II, p. 529-530, 540, 543-4.

And further light is thrown upon his financial condition by the testimony of Foster Young.

In 1908 Dingee "collapsed" as Howard puts it.

In other words, he was in precisely that condition of stress which breeds just such corporate abuses and breaches of trust as the Standard complains of here.

That Dingee was in control of the Standard and the Santa Cruz was unquestioned: that he had the ability to furnish the note of either company at pleasure, was also unquestioned, as Evans, Smith and Howard tell us. And Evans, therefore, thoroughly under-

stood and appreciated the contemporaneous facts of Dingee's desperate financial condition and his control over these cement companies. That Dingee was broke; that Evans and Howard knew it well; that they knew that he could not personally repurchase the bonds that Evans was so anxious to get rid of and had told them so; that they knew that he would be compelled to unload these disastrous bonds upon one of the cement companies that they knew he had in his waist-coat pocket; that this is precisely what all concerned agreed to do; that this is precisely what they actually did do:—all this, and more, arises so conspicuously from this record that the swiftest runner may read it with ease.

Indeed, if Dingee were not in control of these cement companies, this cause would not be upon hearing: it was this very control which opened the way to the appeasement of Evans' consuming anxiety to get something, somehow, in return for the money which he had put into a disastrous speculation; and Evans as well as Howard fully realized the significance of the concurrent facts of Dingee's financial straits and his corporate control.

3. *Dingee's Anxiety.*

And in addition to all this, Dingee was in a state of mental disturbance and anxiety.

The reason for this condition of things is plain. Very naturally, Dingee wanted to get Evans off his

back. He knew full well of the constant complaints that Evans was making.

He had seen Evans' letter of March 4th: he had greeted it with "a burst of profanity" (Young, Record, Vol. III, p. 722): he was fully alive to all that was passing in Evans' mind when Evans wrote of criminal liability; and that he interpreted the letter as a threat, and took it to heart, his acts and conduct, his profanity, his talk to Young and his pencil slip, make entirely clear.

And this very letter, as well as the other criminal letter of Feby. 10th, was written during the period from Jany. to March, 1908, concerning which Evans swears thus:

Record, Vol. I, p. 210-212.

Truly as one reads this, one wonders at the vagaries of the human memory, and one is reminded of the complaint made by a speaker in the introduction to one of Sir Walter Scott's novels: "No, Doctor, I have no command of my memory: it only retains what happens to hit my fancy." *Verbum Sapienti Sat Est.*

But Dingee knew his own financial condition: he knew that he had committed a corporate wrong in his management of the N. W. Co.: he knew that when he misappropriated its funds, he violated his fiduciary obligations and committed a corporate fraud: he knew of the constant complaints of Evans, squirming upon

the anxious seat, eager to get rid of these calamitous bonds, and solicitous for the return of his ducats: he knew of the unanswered inquiries of Evans; and when the suggestion of criminal liability was originated by Evans, and transmitted by Howard, it went home to his guilty consciousness. Is it any wonder that he was agitated, perturbed and upset, exhibiting his feelings in bursts of profanity?

4. *Dingee Needed Time.*

And besides, he needed time. In his then condition, he was ready to give up or give away anything to secure a year's time.

> Compare, Foster Young, Record, Vol. III, p. 751.

Dingee was seeking to carry a heavy load: he was carrying the Atlantic, the Standard, the enlargement of the Santa Cruz after the disaster of 1906, the N. W. Co.; and he could not carry them all. The N. W. Co. was worse than a failure—it was a crime: the Santa Cruz was not a success, and until as late as June, 1908, as Howard tells us, its product was a failure: the financial condition of the Standard, as reflected in its trial balance, was that of a corporation burdened by debt: Dingee's finances had crumbled about him; and if ever a man needed time, Dingee did then. Time alone was his salvation, and time he was plainly determined to get.

5. *His Desire to Conciliate Howard, and Placate the Howard Bondholders.*

And besides, Dingee was desirous of conciliating Howard, who, as the exclusive sales agent of the cement corporations, held the purse strings; and who, significantly enough, loosened those purse strings within a couple of days after Dingee capitulated to Evans' emissary, Howard.

And over it all and through it all, there ran, as already pointed out, his acute personal interest to placate the complaining and threatening Howard bondholders.

Everything had gone wrong: the outlook for Dingee was gloomy, threatening and dispiriting: his horizon was clouded by financial and personal trouble; and when Evans put the finishing touch to the situation with his statement as to the criminal liability of a man who knew that he had done wrong, and who knew that the suggestion was inspired by knowledge of his wrongdoing he broke, and became, as to the Standard, the same faithless trustee that he had already been to the N. W. Co. Dingee was not only a financial wreck, but a moral one as well; and he was peculiarly susceptible to suggestions emanating from a man whose mind he knew to be filled with thoughts of criminal liability. We know of Dingee's unlawful misappropriation of the N. W. Co.'s funds: we know of his unlawful pledging of the B. B. & B. C. Ry. stock to the Am. Bridge Co. to cover a Santa Cruz

Co. debt: we know of his unlawful removal of N. W. Co. machinery and tools from Kendall to Santa Cruz; what chance, then, did the Standard have when it became a question of Dingee yielding to the man who had emphasized Dingee's criminal liability for a wrong that Dingee well knew he had committed? Evans knew that Dingee had betrayed his trust in one corporation: why was not Evans to believe that Dingee could be made to betray his trust in another? As Lord Esher, M. R. puts it, a man who has done one contemptible thing to benefit himself will do another, if necessary, in order to carry out and complete the object he has in view.

Exchange Tel. Co. vs. *Gregory & Co.,* L. R., 1 Q. B. D. (1896) 151.

J. *The Position of the Standard Corporation in March, 1908.*

And what was the position of the Standard Corporation at this critical juncture? The Standard and the N. W. Co. were separate, disconnected and independent corporations, organized at different times; and taking together all that we know of the respective histories of the two companies, it was and is utterly incredible that the Standard was panting with solicitude to purchase the bonds and stocks of the northern fiasco.

No Prior Relations.

Prior to March, 1908, these two companies had been as strangers: never before had there been any contact between them; never before had there been any relations of any sort between them, contractual or otherwise, that those familiar with their affairs knew anything about.

Compare, Howard, Record, Vol. I, p. 271.

And no one pretends to claim that there were any prior relations between the two companies. Never before had the Standard made, or even remotely attempted to make, any purchases of the bonds or stocks of the N. W. Co.: the only so-called purchases ever mentioned in the entire history of these companies, were very significantly just those, and those only, which are involved here: this was the solitary and isolated instance.

No Necessity for Purchase.

There was no corporate need, occasion or necessity for the Standard to purchase this handful of bonds of the Northern fiasco.

No one realized this more clearly than these very parties; and it was not until Howard had returned from his first interview with Dingee, that any of them thought of utilizing the Standard in the process of getting rid of the bonds and getting the money back.

That the Standard did not enter into Howard's calculations is perfectly apparent from his reference to the sale of the B. B. & B. C. Ry., contained in his letter of Dec. 26, 1907, to Evans:

Record, Vol. II, p. 531-2.

At this time, Howard was thoroughly familiar with Evans' state of mind: he was casting about for some way out for his friend, Evans: but plainly he did not then dream of the sacrifice of the Standard,—that the Standard should, with the knowledge, consent and approval of the Howard bondholders, be made the scapegoat for Dingee's N. W. Co. sins, never at that time, entered Howard's head.

Howard admits that he acted as errand boy for Evans and the rest when interviewing Dingee in March, 1908: but when the errand boy came to Dingee, no thought was then in the mind of Evans, Dingee or Howard that the notes of the Standard Corporation should issue. What Dingee proposed was that he would issue the notes of the Santa Cruz Co.—not those of the Standard; and it was only upon Howard's return to report to Evans that he, Howard, not Evans, not Dingee, for the first time, originally suggested the Standard notes, *if they could be had.*

No pretense was made that the Standard should issue its notes because there was any corporate need, occasion or necessity why it should do so; nor was there any pretense that the Standard was under any

obligation whatever to do so, whether arising from any relations with the N. W. Co. or otherwise. On the contrary, Howard advised taking the Standard notes, *if they could be had,* solely upon the ground that the Standard would make the more preferable debtor.

But even at this time, there was doubt and uncertainty in Howard's mind as to whether Dingee would go so far as to issue the Standard notes; and this doubt and uncertainty is given testimonial form in the language, *"if they could be had."* Dingee, however, did issue the Standard notes; and the whole transaction emphasizes the contention that there was no corporate need, or occasion, or necessity, or obligation why the Standard should issue these notes. No other explanation can be made, consistent with the facts, except that these notes were part of a prearranged plan whereby the burden of Dingee's N. W. Co. shortcomings was transferred from him to this innocent and disconnected Corporation: the Standard was, with the knowledge, consent, approval and participation of the Howard bondholders, sacrificed to accomplish a personal purpose of its controlling officer, made necessary to be accomplished by his own wrongdoing in the affairs of an independent company.

No Financial Ability to Purchase.

The financial situation of the Standard is before the Court:

Trial Balance, April, 1908: Record, Vol. III, p. 697-700.

Does not this exhibit demonstrate the absurdity of the Standard, in its then depressed financial condition, without any corporate rhyme, reason, necessity or obligation, and for the first and only time in its entire corporate history, purchasing a handful of the bonds of what Evans described as an abandoned enterprise?

Issuance of Notes in Suit not Explainable upon any Rational Business Theory.

We have seen:

1. There were no antecedent relations between the two companies.

2. There was no corporate need, occasion, necessity or obligation to cause the Standard to issue these notes.

3. The depressed financial condition of the Standard could not normally, or upon any rational theory except that of corporate fraud, justify the purchase of any number of the bonds of a company which had no plant, whose operations had ceased, and whose success was not assured—but the reverse, a monumental failure.

It has, however, been claimed here that the Stand-

ard had an object in acquiring these bonds and stocks, because it wished to control the cement field, and anticipate and prevent competition. This claim is found in the cross-examination of Evans.

Record, Vol. I, p. 222-3.

And even upon the oral argument of this cause, it was contended that this desire to preempt the Northern cement territory, furnished a strong reason why the Standard Corporation should have interested itself in North Western securities. But this claim and contention will not bear investigation.

a. Notwithstanding this alleged anxiety by the Standard to purchase the bonds and stocks of the N. W. Co. so as to acquire a foothold in the north and thus head off adverse competition there, yet the eloquent fact remains that the Standard, although controlled by the same man who controlled the N. W. Co., never originally subscribed for a single bond or a single share of stock of the N. W. Co.: and this although, as Evans says, Bachman made this declaration:

Record, Vol. I, p. 223.

b. No other bonds or stock of the N. W. Co., except those actually involved in this suit, were ever, at any time, or by any person, even claimed to have been purchased by the Standard: the bonds and stocks

involved here are the solitary bonds and stocks ever claimed to have been purchased during the entire history of these companies; and this fact is fatally inconsistent with the asserted anxiety to purchase.

c. No plant was at Kendall in May, 1908, all operations had ceased, and all machinery and tools had been shipped away; nor could the N. W. Co. have established a plant at Kendall if it had wished—it has not yet even paid for the spur track: Record, Vol. III, p. 688. The N. W. Co. was bankrupt: its funds were dissipated: its securities were worthless; it was utterly dead; and all this the business world knew. What rational hopes based upon the N. W. Co. could the Standard entertain?

d. How could the purchase of N. W. Co. bonds and stock be vital to the protection of the Standard in March, 1908, when the time for protection had gone by, and when the field was already occupied by more alert rivals which had outstripped the N. W. Co., and had erected their plants and were marketing their product while the N. W. Co. languished a dead and inert failure. First factory—great advantage:

e. Even if the N. W. Co. had started promptly, yet it would have been an independent plant which could undersell the Standard at least in northern markets, because of its freedom from freight charges, etc., to which the Standard would have been subject: can

any imagination picture Evans foregoing this advantage merely to please Dingee?

f. What appreciable business was the Standard doing on Puget Sound that required protection by the purchase, in March or May, 1908, of the bonds or stocks of a company with such a history as that of the N. W. Co.? Or perhaps the dream was that much fresh business would accrue to the Standard because it had purchased bonds and stocks in a company enjoying such gorgeous success and magnificent prospects as the N. W. Co. enjoyed in March, 1908?

g. Of what use to the Standard would be this insignificant quantity of bonds, either for the purpose of controlling the N. W. Co., or as a protection against other active, developed, operating concerns already in the field?

h. These bonds were listed nowhere: of what use were they for any business purpose, whether as collateral or otherwise?

i. In March, 1908, after the N. W. Co. had risen to the bad eminence of an abandoned enterprise, and when the use of its bonds to protect anything with what had become a screaming farce, and when Evans had become so impressed with the futility of those bonds that he was anxious to get rid of them, how could this insignificant number of *such* bonds enable

the Standard to accomplish any tangible business results in any direction, then or thereafter?

j. The purchase of the bonds and stocks of the N. W. Co. by the Standard was not needed for purposes of protection. Not only was there nothing to be protected, not only had the time for protection gone by, but Dingee was already in conceded control of all of the companies concerned, and did not require *these* bonds to enable him to protect any of the companies under his control.

k. No such claims as this were made by Dingee or anyone else in March, 1908: Evans was not abandoning his investment for the purpose of protecting his investment; and Dingee took the bonds for another and wholly different reason—to protect himself against the consequences of his own wrongdoing. Dingee would have taken these bonds *personally,* if he could: that was the first thought that he expressed, and not the thought that the Standard would take them for protective purposes; and it was only because he knew that he could not take them, and that Evans was clamoring for his pound of flesh, that Dingee, at the suggestion of Evans, conveyed through Howard, violated his fiduciary duties, and unloaded these worthless things upon an innocent corporation then under his sinister control. At none of these meetings or conferences was there any discussion of the protection of the Standard from adverse competition. As al-

ready pointed out, what Dingee first offered was the Santa Cruz note, and at first it was not at all certain that the Standard note could be had: this is entirely clear from Howard's narrative.

l. There would have been no sort of business sense in the Standard throwing away its money on these bonds, unless it intended to finance the N. W. Co.: but this, its own depressed financial condition would not permit it to do. And indeed, since May, 1908, we do not find that the Standard ever attempted anything whatever in the way of rehabilitation of the N. W. Co. All that the Standard ever did was to repudiate these alleged notes.

m. If it were so very vital to the Standard to have this northern connection, and if there had been any real intent to establish a plant there, why did the Standard Corporation wait for over a year before purchasing an insignificant amount of bonds which could of themselves give it no control of the N. W. Co., and which was the sole and solitary purchase ever made by it,—and that too just when the Howard bondholders were complaining of the derelictions of the man who controlled both companies and were not backward in referring to his criminal liability?

This whole contention is a sheer afterthought, conjured up by the exigencies of the situation, and the desire to present some theory to explain and account

for the very extraordinary act attributed to the Standard.

Summary of Situation in March, 1908.

What, then, was the situation in March, 1908? The enterprise at Kendall was a failure: there were no assets there beyond the hole in the ground: no plant was established: there was neither production or sales: no rates were ever definitely fixed with any carrier: Kendall never had a market or a selling agent: it never was in operation or turned out a pound of cement: it had no machinery worth mention: what little machinery or tools it had, were shipped away to Santa Cruz: there was nothing to represent or secure its bonds: its stock plainly had no value: it does not appear that either its bonds or its stocks were ever listed: all operations ceased in November, 1907: it has ever since been abandoned, deserted and desolate.

Evans, Dingee, Bachman and Howard had all been deep in this scheme from the beginning of things: the original idea was that of Howard and Evans, but it was nursed along by all of them; and in Evans' mind, Dingee and Bachman were Howard's "associates." In May, 1908, and prior thereto, to the knowledge of all of them, Dingee was combing the San Francisco streets for money; and ever since March 26, 1908, Dingee was under constant financial obligation to Howard growing out of the discounting of accept-

ances; and naturally, as we have seen, Dingee was fearful of losing Howard as sales agent.

Howard realized his own sense of responsibility, moral and otherwise, to those to whom he had sold bonds; and Evans was not willing that he should forget it, or slow to remind him of the friends "to whom you sold the bonds."

> Letter of February 10, 1908: Record, Vol. II, p. 546.

But Evans became agitated and dissatisfied as counsel admits, and suspicious: with Howard's help, he obtained the results of an investigation: he learned of Dingee's misappropriations, thoughts of criminal liability entered his mind: he turned upon Dingee, who could not help himself; and then Dingee, to serve his personal interest, turned on the Standard, with Evans' knowledge and consent, and sacrificed it —became to it the same faithless fiduciary, the same betrayer of his trust, that he had been to the N. W. Co. and the consequence of this evil combination was that the notes of the Standard Corporation, a separate, independent and disconnected corporation, having no need or funds for the purchase of any bonds, much less those of an abandoned enterprise, were issued so that those concerned might go through the motions of making an alleged sale at par of bonds malodorous through the delinquencies of Dingee committed with the funds of the issuing corporation, to

the complete antecedent knowledge of Evans and Howard.

And when Evans took those notes he had antecedent knowledge that the Kendall enterprise was not a success; that the bonds and stocks had no honest market or other value: that there was no rational assignable motive why the Standard, itself heavily burdened, should purchase such a worthless unlisted commodity as the bonds and stocks of this monumental fiasco; that Dingee could not purchase, or pretend to purchase them, because he was a financial wreck: but yet, that the Standard was still under the control of the wrongdoer. What equities are there here to which this scorched speculator may justly appeal? Having been scorched, he now seeks to offer up an independent and innocent corporation as a sacrifice for the purpose of enabling him to get back his money; and it is a matter of the most supreme indifference to him what fraud may have been committed upon the Standard, so long as he gets his money.

There is a plain simultaneity and progressiveness, a fixed purpose and plan running all through this history so creditable to high commercial morality and ethical standards: indeed, many of the leading facts occurred during the first six months of 1908. Thus, we have:

The gap in the correspondence from January to March, 1908.

Evans' consultation with Howard on Puget Sound.

Wenzelburger received his stock on February 10, 1908—the same day that Evans wrote one of the criminal liability letters to Howard.

Wenzelburger made his report to Howard on February 27, 1908, and Howard immediately sent it to Evans.

Wenzelburger turned back his stock on April 13, 1908.

Evans having already, in December, 1907, sent unanswered letters to Dingee, now came to San Francisco *as soon as he could* after receiving the report. Letter of January 29, 1908: Record, Vol. II, p. 536-7.

After Evans learned of Dingee's misappropriations, he wrote the second criminal liability letter of March 4th, 1908.

Upon arrival in San Francisco, Evans went at once into consultation with his fellow bondholder Smith, and with Howard.

Thereupon ensued Howard's interviews with Dingee.

Evans then rejected the Santa Cruz note, and accepted the Standard.

Immediately upon the settlement of the plan of action, Howard began advancing money to Dingee.

When the notes were made, Howard, like Evans, turned back his stock.

And through all this, we have, as we have seen, the most intimate relations between Evans and Howard,

and Howard and Dingee, and Dingee and the Standard: We have this delightful little circle of intimacy and influence, namely:

Evans plus Howard;
Howard plus Dingee;
Dingee plus the Standard.

Was anything necessary, then, so to complete the circle as to give us, Evans plus the Standard? The sequel demonstrates that there was not.

As observed by Mr. Justice Ladd:

> "The influence of intimate association is often more potent than business discretion."
>
> *Germ. Sav. Bk.* vs. *Des Moines Nat. Bk.*, 98 N. W. (Iowa), 606, 607.

In view of the facts, may any of these parties successfully maintain his independence of, or isolation from, the others? Do not the facts exhibit that intimate coherence so characteristic of community of interest? Were not these people closely connected by personal and business relations, by a common interest and a common purpose? Were they not frequently in each other's company? Do we not find them lunching, corresponding and consulting together? If these people were strangers, unconnected by any of those sets of facts which combine men's purposes, one might not so readily believe them to be animated by a com-

mon design against the Standard: but where we find them all, from various motives, consistently seeking the accomplishment of that common design, we have no difficulty in perceiving the unification of this coterie and the singularity of purpose that animated them. Could these people be heard for a moment to profess that facts known to, or schemes intended by, one of them, were not known to or intended by all of them? Fortunately, as was said in a recent case:

> "Courts will not pretend to be more ignorant than the rest of mankind."
>
> *Power* vs. *Bowdle,* 54 N. W. (N. Dak.), 404.

And, as remarked by Mr. Justice Sherwood:

> "Neither courts nor juries are required to believe nonsense merely because it was sworn to."
>
> *State* vs. *Gurley,* 70 S. W. (Mo.), 875.

And to the same effect, *inter alia:*

> *Blankman* vs. *Vallejo,* 15 Cal., 638;
> *Quock Ting* vs. *U. S.,* 140 U. S., 417.

Evans' Knowledge in March, 1908.

Mr. Evans is entitled to no consideration as an innocent taker, in good faith, of the notes of the Standard Corporation: on the contrary, he knew that he was *particeps* on one of the grossest frauds ever perpetrated by a fiduciary upon his *cestui que* trust.

What does the record show as to Evans' knowledge? The following list of facts within Evans' knowledge prior to his taking the Standard notes, is not exhaustive:

1.—Evans knew that the N. W. Co. and the Standard were separate, independent and disconnected corporations.

2.—He knew that Dingee was an officer and director of each company, and controlled both.

3.—He knew that the relations between Howard and Dingee were intimate.

4.—He knew that the N. W. Co. was non-producing, that it had no plant, that it was not a going concern, that it paid no dividends, that it had neither income nor sinking fund, that it was deeply in debt, and that it was not a success.

5.—He knew that while it was important to establish the N. W. Co. plant before rivals got the start, yet this was not done, and the N. W. Co. had missed its opportunity: Record, Vol. I, p. 192.

6.—He knew that the Santa Cruz Co., another Dingee enterprise, had just started, with a heavy debt and poor product, and its success was not assured.

7.—He knew that Howard was active in promoting the N. W. Co. and floating its bonds.

8.—He knew that Howard, Dingee and Bachman were to share "alike" in the N. W. Co. promotion profits.

9.—He knew that there never was a stockholders' meeting of the N. W. Co. subsequent to November 3, 1906, the date of the authorization of the bond issue.

10.—He knew that work had stopped at Kendall, and that there was no immediate prospect of its resumption.

11.—He knew from the disclosures of the Wenzelburger Report, if not before, that Dingee had wrongfully diverted the funds of the N. W. Co.: he knew, in other words, that Dingee had betrayed his trust in one corporation; and he well knew that such a man, to serve a personal interest, would betray it again in another corporation. This very human characteristic was recognized by Lord Esher when he said that a man who has done one contemptible thing to benefit himself, will do another, if necessary, to carry out and complete the object he had in view.

Exchange Tel. Co. vs. *Gregory & Co.,* L. R. 1 Q. B. D. (1896), 151.

There may be a "probability that the course followed in one instance would be followed in others";

Bone vs. *Hayes,* 154 Cal., 759, 767.

And so:

> "When one discovers that he has been put upon and defrauded as to one material matter, notice is at once brought to him that the man who has been false in one thing may have been false to him in all, and it becomes incumbent upon him to make full investigation."

Evans vs. *Duke,* 140 Cal., 22, 28.

12.—He knew that the Santa Cruz Co. was one of the very companies to which Dingee had diverted N. W. Co. funds.

13.—He knew that Dingee had ignored his letters seeking information.

14.—He knew that there had been no antecedent relations, prior to March, 1908, contractual or otherwise, between the N. W. Co. and the Standard.

15.—He knew that he had been suspicious long prior to March, 1908; and that, prior to his receipt of the Wenzelburger Report, he had become "very sore" upon his N. W. Co. investment.

16.—He knew that he wanted to get out of his N. W. Co. investment: that he wanted to get rid of the bonds; and that he wanted his money back.

17.—He knew that Dingee was "broke": that he was borrowing money everywhere; and that he was unable to take the bonds or pay for them.

18.—He knew that while Howard had never put a dollar of his own money into the N. W. Co. scheme—was not "a *bona fide* investor," yet Howard fully realized his responsibility to those who bought bonds from or through him, and Howard had agreed to look after Evans' interests as he would after his own.

19.—He knew that Howard had approached Dingee as the representative and spokesman of the Howard bondholders.

20.—He knew that the Santa Cruz Co. note—the note originally proffered by Dingee—was insufficient, and so rejected it.

21.—He knew of no corporate necessity, obligation or compulsion justifying the Standard, especially in its then financial condition, in purchasing this meager quantity of the bonds of an abandoned enterprise.

22.—He knew that these notes were the result of a personal interview between his representative

and the fiduciary of an independent corporation, already guilty of corporate betrayal, already the recipient of significant suggestions as to his criminal liability, and already in desperate financial straits.

23.—He knew that Dingee's control over the Standard and the Santa Cruz Co. was so firm that his ability to give the note of either company was unquestioned.

24.—He knew that, under all the conditions, it was Dingee's wish, for his own sake, to placate the Howard bondholders.

25.—He knew, as far back as March, 1908, that the plan adopted to appease the malcontent bondholders, was to cause a disconnected and innocent corporation, by reason of its being in the control of the wrongdoer, to go through the form of issuing its note to purchase alleged bonds of an abandoned enterprise.

26.—He knew that he never sent any bonds or stocks to the Standard.

27.—He knew that the bonds and stocks of the N. W. Co. were listed nowhere: that the enterprise was not a success; that the bonds and stocks fell with the enterprise, and were of no value; and that that was why he was so anxious to get rid of them.

28.—He knew that neither the Kendall land, nor any other alleged "asset" of the N. W. Co. was good for the bond issue; and that Howard had told him so.

29.—He knew that the N. W. Co. bonds and stocks were never listed among the Standard assets, nor these notes among the Standard liabilities.

30.—He knew that this pretended sale of these wretched bonds and stocks of an abandoned enterprise to the Standard, was the merest sham and involved as gross a breach of fiduciary obligation and as inexcusable a corporate fraud as the books will exhibit anywhere.

Evans could do very nicely with a mere "intimation":

Record, Vol. I, p. 178.

Can Mr. Evans pose here as a simple, misguided innocent? Can he affect the role of an innocent taker without notice? Was that not as deep in the scheme as any of them? Did he not, with full knowledge, accept the notes of an innocent corporation for worthless securities at their par value? Can he now invoke the aid of equity to compel that sacrificed corporation to complete the sham? What does the California Civil Code say?

Civil Code, Secs. 18, 19.

And what does the ultimate tribunal say?

"To constitute a *bona fide* holder of a note or check it is necessary—

"1. That it should have been received before maturity;

"2. That a valuable consideration should have been paid for it; and

"3. That it should have been taken without knowledge of the defenses sought to be made."

Hunt, J. *Mayor* vs. *Ray,* 19 Wall., 482.

"Wherever inquiry is a duty, the party bound to make it is affected with knowledge of all he would have discovered had he performed the duty."

Strong, J. *Cordova* vs. *Hood,* 17 Wall., 8.

"Means of knowledge with the duty of using them are, in equity, equivalent to knowledge itself."

Strong, J. *Cordova* vs. *Hood,* 17 Wall., 8.

"Every man is chargeable with notice of that which the law requires him to know, and of that which, after being put upon inquiry, he might have ascertained, by the exercise of reasonable diligence."

Waite, C. J. *McClure* vs. *Township of Oxford,* 94 U. S., 432.

And see, also:

Standard Assn. vs. *Aldrich,* 163 Fed., 216;
McCloskey vs. *Goldman,* 115 N. Y. S., 189;
Simmons' Nat. Bank vs. *Dillon Foundry Co.,* 130 S. W. (Ark.), 162;
Underwood vs. *Germ. L. S. Co.,* 67 S. E. (N. C.), 587.

"'Good Faith' is an honest intention to abstain from taking any unconscientious advantage of another, together with an absence of all information or belief of facts which would render the transaction unconscientious."

Cardenas vs. *Miller,* 108 Cal., 250, 257.

But between this definition and Evans' mental conditions there was an impassable gulf.

Evans' State of Mind in March, 1908.

Such was Evans' knowledge in March, 1908: what was his state of mind?

1. He had, in the beginning, entertained "Great Expectations" concerning the N. W. Co.
Willing and anxious to invest:

Record, Vol. I, p. 149: Vol. II, p. 393-4, 552.

2. But he also felt anxiety about the progress of the scheme, the forthcoming of the funds for the plant, and the keeping of the promises made to him. This

appears constantly throughout the record, and but one illustration will suffice:

Record, Vol. II, p. 492-3.

3. But when he received Wenzelburger's Report, he knew that the funds for the plant were not forthcoming:

Record, Vol. I, p. 174.

4. And he also knew that "only a little" of the proceeds of the bond issue had been employed in the development of the N. W. Co.:

Record, Vol. I, p. 192.

5. And he also knew that the N. W. Co. was not a going concern, but abandoned on account of the financial stringency for the time being,—an abandonment which nothing in this record shows to have been ever cured.

Record, Vol. I, p. 192.

6. Very naturally, these things aroused Evans' suspicions and sorrow:

a. Howard tells us of Evans' constant complaints:

b. Evans complained as far back as May 17, 1907:

Record, Vol. I, p. 155.

c. And again, prior to September, 1907:

Record, Vol. I, p. 158-9.

d. In point of fact, he had given expression to his sorrow and suspicions during the August preceding:

Record, Vol. II, p. 523-4.

e. In the following month, he doubts again:

Record, Vol. II, p. 525-6.

f. Again, on December 11, 1907, we have more suspicions:

Record, Vol. II, p. 527-8.

g. And nine days later, he writes Dingee and suggests "in the interest of all concerned, to abandon the project for the time being, and return the bondholders their money."

Record, Vol. I, p. 160-161.

h. This letter being unanswered, he writes again to Dingee on January 6, 1908, enclosing a copy of the letter of December 20, 1907: but again, his communication is ignored:

Record, Vol. I, p. 161-3.

7. Is it any wonder, then, that when his expectations were shattered, he became *"very sore"?*

Letter to Howard of December 20, 1907:

Record, Vol. II, p. 530-1.

Written same day as the first unanswered Dingee letter.

8. He resented the turning of the N. W. Co. into a loaning institution.

Record, Vol. I, p. 192-3.

9. His state of mind was such that he thought it best to get rid of the bonds:

Record, Vol. I, p. 192.

Lost confidence in Dingee: Refused to accept his assurances that the work at Kendall would go on.

Record, Vol. I, p. 191-2.

10. By the end of January, 1908, he intended to get satisfaction out of Dingee:

Record, Vol. II, p. 536-7.

11. In February, 1908, he speaks of Dingee's criminal liability and prosecution.

Record, Vol. II, p. 546.

12. And he recurs to the subject on March 4th, 1908:

Record, Vol. II, p. 549-550.

13. And Percy, whom Ernest had no secrets from, reflects the same state of mind:

Record, Vol. I, p. 213: Vol. II, p. 504; Vol. III, p. 894-5.

14. And Howard's explanations throw further light upon the state of Evans' mind.

Holds out hopes to Evans:

Record, Vol. II, p. 531-2.

Admits the "wrong":

Record, Vol. II, p. 534-5.

Concedes inadequacy of investment:

Record, Vol. II, p. 535.

The Dingee Interviews.

Such being the situation, position, relations, financial condition, knowledge and state of mind of the parties in March, 1908, what were the Dingee interviews?

Evans' version is contained in his Deposition:

Record, Vol. I, p. 186-8.

a. In the selection of Howard as representative, we see a recurrence to a point of view which is frequently suggested throughout the record,—"we made our subscriptions to these bonds through him."

Record, Vol. I, p. 187.

b. "It was not advisable, in view of the financial situation, to press the construction now."

Record, Vol. I, p. 188.

Here, we have another light on Dingee's financial position. Nor has any construction been attempted since: Kendall is as much abandoned to-day as it was then.

c. "If your friends are uneasy, I will arrange to buy these bonds back."

Record, Vol. I, p. 188.

But why should not Howard's friends be uneasy? Had they not good cause to be uneasy?

Did not Dingee know that they were uneasy? Had he not heard complaints innumerable? Did he not know about Wenzelburger investigation? Did he not know that he had been an unfaithful fiduciary? Did he not know that the phrase "criminal liability" was too much upon the lips of Howard's friends?

"I will arrange to buy these bonds back": if all things were regular, what obligation was Dingee under to buy back anybody's bonds? Why should he have done this incriminating thing? And what constrained him that he should do it upon a mere request from the author of the criminal liability letters? And what knowledge did these Howard hondholders have, which emboldened them to expect that Dingee would arrange to buy back these bonds?

d. "I cannot pay for them myself."

Record, Vol. I, p. 188.

This plainly shows Dingee's financial position then. And as bearing thereon, see:

Record, Vol. I, p. 189-190.

What then did Evans expect Dingee to do except unload the rubbish upon one of his cement corporations?

e. "I can arrange either with the Standard Portland Cement Company to buy them, or the Santa Cruz."

Record, Vol. I, p. 188.

In this very characteristic form of expression, we hear the voice of the controller of these companies—of the man who was their fiduciary in a double sense, not only by the general principles of corporation law, but also by reason of his special relations to the companies. And this use of the first person singular is not infrequent with the arbiter of the destinies of these companies: thus, we have:

"I will arrange to buy these bonds back":

Record, Vol. I, p. 188.

"I will arrange to retire the bonds":

Record, Vol. I, p. 189.

And so, we find this fiduciary of the two companies giving his choice to the malcontent bondholder of a stranger company, between the notes of two companies

which had no relation to or interest in the stranger company, in order to subserve a personal end of that fiduciary,—and this, to the knowledge and with the consent and participation of the malcontent bondholders:

Record, Vol. I, p. 204.

Very plainly, Dingee was transferring to corporations under his control, a burden that he should have borne himself: he was sacrificing his *cestuis que trustent* to his personal advantage: he was committing a fraudulent breach of trust, for his personal profit. It nowhere appears that he took the trouble to consult his stockholders or directors: on the contrary, it does appear that the entire deal was arranged without the slightest reference to stockholders or directors. It nowhere appears that either of these corporations was out in any market anxiously seeking to snap up the unlisted bonds of an unsuccesful enterprise. It nowhere appears that there was any corporate reason why they should do so insane an act. It nowhere appears that they had any surplus funds to waste in worthless so-called securities—quite the reverse. Nor can any explanation be produced, consistent with the facts in this record, to account for the issuance of these notes, except that Dingee, in his extremity, by reason of his control, and with the knowledge of the Howard bondholders, simply used these companies for

his personal purposes,—became again the treacherous fiduciary.

And was not Dingee's offer of a choice between the notes of two independent corporations that were quite dissociated from the N. W. Co. and its bonds, of itself a red badge of warning to Evans and the rest? How was it possible that Dingee could honestly issue as he pleased the note of either of these corporations in a matter in which neither had the slightest corporate concern? Is it not somewhat extraordinary that Dingee, without any prior consultation with stockholders or directors, and in a matter which involved his own wrongdoing in the affairs of another company, could, as between the Standard and the Santa Cruz, and for his personal advantage, deliver as he pleased the note of either? Evans knew all the facts: and unless he lacked the mental development of a troglodyte, he knew that the situation spelled fraud and nothing else: fraud upon the corporation that was selected for the sacrifice: fraud that he was prepared to participate in so as to get rid of the worthless bonds and recover his money: fraud that he did consciously participate in.

The managing officer of a corporation cannot dispose of its notes at his will: nor can he transform his corporation into a corporation sole.

Wheeler vs. *Bldg. Co.,* 159 Fed., 391, 393-4;
Am. Mach. Co. vs. *Norment,* 157 Id., 801, 804;

Woodruff vs. *Shimer,* 174 Id., 584, 586;
Wheeler vs. *Mg. Co.,* 71 Pac. (Colo.), 1101;
N. La. Assn. vs. *Milliken,* 35 So. (La.), 264, 266.

Howard Version. Howard tells us that he had two interviews with Dingee.

Evans does not agree to this: he insists that there was but one:

Record, Vol. I, p. 190.

Howard's First Interview. On this occasion, he "was offered the note of the Santa Cruz Portland "Cement Company, with the endorsement of Dingee "and Bachman. I reported back."

He was, he says, offered this note for the re-purchase of the N. W. Co. bonds.

From this testimony it is plain that up to this time no one had thought of the Standard at all: it was then no more concerned in the matter than it was when Howard, seeking relief from Dingee for his friend Evans, told Evans of the possible sale of the B. B. & B. C. Ry. as affording a way out.

Record, Vol. II, p. 531-2.

And Howard went to Dingee because "they had "suggested that I come round and talk with him about "*relieving them of the investment*:"

Howard's Second Interview. When Howard re-

ported back, he "advised them that in my opinion it "would be better to take the note of the Standard "Company, if it could be had."

Here, we have the first appearance of the Standard upon the scene. The first intimation came from Howard, not from Evans, not from Dingee: but Howard never suggested that the Standard should take the bonds because it would thus secure protection in the north from adverse competition. There was no solicitude in the minds of any of those concerned, for the corporate welfare or future prospects of the Standard: on the contrary, the governing thought in the minds of all concerned, was merely whether the Standard was not a more acceptable debtor for Evans than the Santa Cruz Co. Evans was the objective point, not the Standard: Evans' welfare and wishes controlled, not those of the Standard; and no one gave any thought to the protection of the Standard from northern competition, because every one knew better—everyone knew that these worthless bonds would not protect anybody against anything.

Howard's reason why the Standard note should be taken, if it could be had, had nothing whatever to do with adverse northern competition: no such thought as that had any place in Howard's mind, on the occasion in question. From the testimony, the only permissible conclusion is that the real question was, not whether the Standard would purchase these bonds to

defeat adverse northern competition, or for any reason affect northern conditions as sworn to by Evans upon his deposition, but whether Evans would prefer the Standard as his debtor rather than the Santa Cruz: and this conclusion is strengthened by the declaration of Smith at page 975 of Vol. III of the Record, that Howard's suggestion "that the Standard Portland Cement Corporation would be a better corporation to deal with," was followed by Evans.

And it may be added that there is a clear discrepancy between Evans and Howard as to a very material matter affecting the Dingee interviews, namely, the extent of Howard's authority in those interviews. Evans, when a witness upon the Federal hearing, swore flatly that Howard had no authority upon this errand to Dingee either to make a proposal to Dingee or to accept one from him on behalf of Evans: but Howard affirmatively swears that after a consultation and discussion concerning the general affairs of the North Western, the unsatisfactory conditions affecting the bondholders' moneys, and the stoppage of work on the plant, it was finally concluded that he should visit Dingee *and suggest to him the repurchase of these bonds that had gone through Howard's office carrying out a notion that Howard had expressed in a previous letter to Ernest Evans.*

It is among the simplicities of the law in cases of this class that among the various elements to be considered are these, that the relations between the parties

concerned were intimate, that such intimacy is specially important where normally and in the particular transaction under investigation the parties should be adversary, that there were private meetings between them, that there were other concurring conditions, that their relations and meetings culminated into an agreement, that this agreement was of an inequitable nature, that thereafter the parties pursued a consistent course of conduct towards the consummation of such an agreement, and that the consequences of such agreement were injurious to the party against whom it was directed. In most cases the conclusion of fraud results from the grouped and aggregated acts, conduct, circumstances and relations of the parties: nothing, indeed, could be more improper than to segregate each element of proof from the others; because, by this course, a number of circumstances if taken singly might be regarded as harmless, whereas, were such circumstances taken altogether and considered as an entirety, they would indicate a consistent purpose and afford satisfactory proof of the fraud charged and of the participation in it. As observed by the Supreme Court of Maryland:

> "This mode of dealing with separate pieces or items of evidence, segregated from all the other evidence of the case, is wholly unwarranted, and has no support in any principle of reason. The strongest case or defense, proved by a combination of facts, might be overcome and destroyed

by that method of dealing with the separate facts or items of proof."

Cover vs. *Myers,* 32 Am. St. Rep., 394-400.

And so, for example, when we come to contrast the motives impelling Howard to advocate the purchase of these alleged bonds by the Standard Corporation, with the reasons impelling Dingee to yield to Howard's demand all of the facts and circumstances should be considered together as a whole, and not by fragments. Thus, for example, upon the one hand, Howard's origination of the Puget Sound idea, his nursing of that project, his intimate connection with the North Western enterprise from the start, and his personal activity in launching it: Howard's intimate business and other relations with Evans and the others in the north, and his desire to maintain and continue those relations: Howard's intimate business and other relations with Smith and the others in San Francisco, and his desire to maintain and continue those relations with local people: the unfailing and persistent recollection of the bondholders that it was through Howard that they had purchased these worthless bonds (see for example *Evans,* Record, Vol. I, p. 187), and Howard's acknowledgment of the consequent responsibility "moral and otherwise" in his letters (see for example, letter of December 16, 1907: Record, Vol. II, pp. 529-530): Howard's knowledge of the financial condition of Dingee's Cement Com-

panies and his consequent alarm over the sacrifice of the money invested in these alleged securities. Howard's personal anxiety as illustrated by his turning on Dingee in his letters to Evans, and his suggesting the Wenzelburger investigation and other measures for the relief of these bondholders:—all this, and more, should be considered, not in a fragmentary way, but in connection with all the other facts and circumstances in the case bearing upon and illuminating Howard's motives throughout the transaction under discussion.

And so, upon the other hand, Dingee's actual wrongdoing in his embezzlement of North Western Company's funds: his knowledge that Evans and the others knew of this wrongdoing through the Wenzelburger investigation and otherwise: the control exercised by Howard in his capacity of exclusive sales agent, over Dingee's income derived from the sales of cement: the vast importance to Dingee of Howard and his selling organization, and Dingee's anxiety to retain that selling organization: Howard's threat during a critical time to discontinue that sales agency, which threat, if not averted by Dingee's promises to be good, would have expeditiously completed the ruin of the Cement Companies (Record, Vol. II, p. 539, 542, 543-5, 545): the depressed financial condition of Dingee's Cement Companies (Record, Vol. II, p. 543-5): Dingee's depressed financial condition in which he was unsuccessfully combing the streets of

San Francisco for money: the heavy load that Dingee was carrying, and his crying need for time: Evans' threats of criminal prosecution, and particularly as communicated to Dingee by Howard (letters of January 29, 1908, February 10, 1908 and March 4, 1908: and Percy, too, letter February 8, 1909 to John L. Howard): Evans' following up his threats by coming to San Francisco as soon as he could and consulting with Howard, Smith and Spencer, and preparing to "let loose the dogs of war" (letter May 10, 1909, Howard to Evans: Record, Vol. III, p. 902): the pointed significance of the extraordinary extent of Dingee's yielding to Howard, which went so far as even to give to these bondholders their choice of either cement company's note: coincidentally with Dingee's yielding to Howard, Howard began, on March 28, 1908, to make to Dingee those advances which Dingee needed so badly:—all this and more, we submit, should be considered, not in a broken way, but in connection with all the other facts and circumstances in the case illustrating the reasons which impelled Dingee to yield to Howard's demand made in that eventful interview in March, 1908, which took place privately and behind the back of the stockholders and even the manikin directors of this disconnected corporation, then, unfortunately under Dingee's sinister control. Of course, the various indicia referred to in this brief are not offered as exhaustive on the subject: because other illustrations, specific in

character as distinguished from the general inference of fraud, will be found. Some of these illustrations are particularly forcible, intrinsically considered: others are not only intrinsically convincing evidences of the fraud charged, but they acquire an added force from their relations to and with other facts and circumstances: for it must never be forgotten that here as in other departments of the law, even if a given fact standing alone might not be sufficient in and of itself and disconnected from the other facts in the case to establish the claim made, yet it may from and by its association with other facts and circumstances,—regarded cumulatively, so to speak, become of pregnant consequence. As Chancellor Kent puts it (2 Comm., 12 Ed., 484):

> "A deduction of fraud may be made, not only from deceptive assertions and false representations, but from facts, incidents, and circumstances which may be trivial in themselves, but decisive evidence in the given case of a fraudulent design."

SURROUNDING AND SUBSEQUENT EVENTS.

A. The Secrecy of the Transaction.

From the depositions and record, generally, one can not help drawing the inference that both Howard and Evans were rather adept in avoiding publicity; and it nowhere appears that the transaction whereby the burden of Dingee's shortcomings was sought to be shifted to an innocent and defrauded corporation, was

given any publicity. Outside of those immediately interested, no one seems to have been apprised of it.

And why was no stockholder's meeting called to determine whether the Standard should be obligated to ward off the consequences of its officer's wrongdoing in the affairs of another company? There was ample time: the conclave was held on March 25, 26, 1908: the special meeting was not held until May 5, 1908: did not the stockholders have a very vital interest in seeing that the corporation's assets, credit and funds should not be diverted from their legitimate purposes? Unless restrained by the by-laws, the directors may call a meeting of the stockholders whenever in their judgment a meeting would be proper: it is the right of the stockholders that corporate assets shall not be diverted to satisfy personal ends—that corporate assets shall be used for legitimate corporate purposes only: why then was there no meeting? What was there to hide?

Secrecy seems to be a characteristic of fraud. Usually, at some stage in the development of a fraudulent transaction, one encounters this earmark and badge of fraud. It is not, of course, to be expected that the actor will advertise his purposes in the daily journals, or invite disinterested persons to supervise the concoction and enactment of his schemes, or bawl his intentions from the housetops: but nevertheless, at some stage or other, in some form or other, this element of

secrecy will be perceived. Fraud, however, is a question of fact:

Hume vs. *Scruggs,* 94 U. S., 22, 28;
Lloyd vs. *Fulton,* 91 Id., 485;
Williams vs. *Davis,* 69 Pa. St., 28;
McKibben vs. *Martin,* 64 Id., 256;
Knowlton vs. *Mish.,* 8 Sawy., 627.

"Circumstantial evidence is not only sufficient, but in most cases it is the only proof that can be adduced."

Rea vs. *Missouri,* 17 Wall., 543.

"The fraudulent conspirators will not be prompted to proclaim their unlawful intentions from the housetops, or to summon disinterested parties as witnesses to their nefarious schemes. The transaction, like a crime, is generally consummated under cover of darkness, with the safeguards of secrecy thrown about it."

Wait, Fraud. Com., Sec. 13.

Secrecy, says the Supreme Court, "is a circumstance connected with other facts from which fraud may be inferred."

Warner vs. *Norton,* 20 How., 460.

Parties practicing fraud almost invariably resort to expedients to conceal the evidence of it. Fraud

always takes a tortuous course, and endeavors to cover and conceal its tracks.

Sarle vs. *Arnold,* 7 R. I., 585;
Marshall vs. *Greene,* 24 Ark., 418.

And Chancellor Kent says:

"A deduction of fraud may be made, not only from deceptive assertions and false representations, but from facts, incidents and circumstances which may be trivial in themselves, but decisive evidence in a given case of a fraudulent design."

2 Kent, Comm., p. 484.

B. The Special Meeting.

To carry out the plan agreed upon, and as a step in its development, a pretended special meeting was had on May 5, 1908. The only directors who attended were Dingee, Bachman and McGary; and from what we have learned in this cause, the meeting was entirely an Addicks' meeting:

Pepper vs. *Addicks,* 153 Fed., 383, 397, (Par. 22, 1st sentence) 403, 406-7.

Such meetings must be attended by a legal quorum.

Civil Code, Sec. 305;
Basset vs. *Fairchild,* 132 Cal., 637.

But the position of Dingee was such at this time

that no legal quorum was present; and much, if not all, that may be said of him, will be applicable to the other two. Dingee's presence was necessary to constitute a quorum: but since he was disqualified by interest, it is plain that there was no quorum.

Dingee was in unquestioned control of all three cement companies: he was a fiduciary of all three; and his relations to these companies involved, under the situation here, a violation of duty by him whichever way he turned. Thus, when Evans arrived in San Francisco, and dispatched his alter ego, Howard to Dingee, the self interest of the latter, all concerned knowing of the illegal misappropriation of the N. W. Co. funds, would naturally prompt him to do the best he could for himself by transferring his burdens to his Standard Corporation, with the consent of the Howard bondholders.

Upon the other hand, he was, as Vice President of the Standard Corporation, a fiduciary for that Corporation: all his interest, duty and obligation belonged to it: he was its trustee, bound up to it, and obligated to subserve its interests, by every possible consideration suggested by his trust: he was the trusted protector of its interests, and bound to subserve those interests in preference to his own,—bound to render it complete and qualified fealty by every consideration known to equity and morals. And all of this, these Howard bondholders well knew.

In any transaction which involved these Howard

bondholders, the N. W. Co. of which also Dingee was a fiduciary, the Standard Corporation, and the claims of N. W. Co. bondholders against Dingee growing out of his misappropriation of N. W. Co. funds and the cessation of operations at Kendall, Dingee was at once forced into a position which involved an intolerable and inequitable antagonism of interests: and whichever way Dingee might turn, some interest would suffer; but no court, certainly no court of conscience, could countenance traffic of that sort.

As said by Judge Ross:

> "Occupying as he did the position of trustee, he should not have put himself in a position adverse to his *cestuis que* trusts. One cannot faithfully serve two masters whose interests are diverse."
>
> *Davis* vs. *Rock Creek, etc. Co.*, 55 Cal., 359, 364.

These Howard bondholders were acting in concert with Dingee ever since the meeting of minds on March 25, 26, 1908: they were not strangers to each other: they had dealt together before: they were all fully cognizant of all the relevant facts: they all knew how these notes came about: they all knew that they did not represent a legitimate corporate obligation of the Standard: they all knew that there never were any antecedent relations between the N. W.

Co. or themselves and the Standard, out of which any corporate obligation of the latter could have grown: they all knew that these notes were designed to meet their claims and demands upon Dingee growing out of his wrongdoing in the affairs of the N. W. Co., and that their causing the transaction to take the form of a sale of a mere handful of useless and worthless bonds of an abandoned enterprise to a corporation which had neither need or use for them and was itself financially depressed, was a barefaced sham, and a mere cloak designed to conceal the real nature of the deal; they knew that, by these notes as the unlawful instrumentality, the burden of those alien delinquencies of Dingee was to be, and would be, taken from Dingee and imposed upon the Standard; they knew, none better, that the whole deal, in which they all participated, and which they all assisted, was nothing more than a rank imposition and fraud upon the Standard, made possible by Dingee's hold on the Standard, and their hold on Dingee; they knew all of this, and yet they appeal to equity to put a premium upon the fraud by consummating the transaction for them.

How, then, can it be contended here that, at this special meeting, where Dingee's presence and vote were necessary; the one to the legal quorum and the other to the passage of the resolution which he introduced, Dingee was disinterested? It is certainly opposed to plain public policy that such notes should

be issued by the vote of a board of directors who were the puppets and marionettes of an insolvent delinquent who was directly interested in transferring burdens and obligations from his own shoulders to those of the Standard; and the votes of those puppets and marionettes could not properly have any effect in Dingee's favor, or in favor of these bondholders, the conscious beneficiaries of these machinations, against the corporation or its stockholders.

Goodell vs. *Verdugo Canon Water Co.*, 138 Cal., 308.

If, as both Dingee and the Howard bondholders well knew, these notes were not legitimate obligations of the Standard Corporation, but were in truth and reality evoked by and designed to meet claims made against Dingee because of his delinquencies in the affairs of another company, without regard to the rights or interests of the Standard Corporation, which was treated as Dingee's chattel to be prejudiced as he pleased, then the rules as to the action of corporate directors should clearly prevent any change in the situation to Dingee's advantage or to the advantage of these bondholders, as against the Standard or its stockholders. But these bondholders are here attempting to recover upon alleged notes of the Standard which were issued by directors in collusion with them and Dingee, and in the interest of Dingee and themselves. Such notes are void, and the law does not

stop to inquire into the fairness or unfairness of the transaction.

O'Neill vs. *Quarnstrom,* 6 Cal. App., 469, 474;
Hall vs. *Auburn Turnpike Co.,* 27 Cal., 255.

And see:

Triplett vs. *Fauver,* 48 S. E. (Va.), 875;
Golden Glen Mfg. Co. vs. *Stimson,* 98 Pac. (Colo.), 727;
Camden Land Co. vs. *Lewis,* 63 Atl. (Me.), 523;
Booth vs. *Summit Coal Mg. Co.,* 104 Pac. (Wash.), 207;
Voorhees vs. *Mason,* 148 Ill. App., 647.

C. Their Ceremonious "Sale."

Could anything be more suggestive to an inquiring mind than the elaborate ceremonial by which the inherent and underlying vice of this transaction was sought to be masked? Do not the solemn farce of that special meeting of Dingee puppets whose wires their master pulled to accomplish a cut-and-dried scheme, the sanctifying spectacle of Dingee presenting a resolution demanded by Evans nearly six weeks before, the seconding thereof by McGary who always did whatever Dingee told him to do, the reels of red tape that, by prearranged scheme, were to strangle the Standard,—does not all of this flummery and claptrap recall the remark of Mr. Justice Bradley?

"It is insisted that the proceedings were all conducted according to the forms of law. Very likely. Some of the most atrocious frauds are committed in that way. Indeed, the greater the fraud intended, the more particular the parties to it often are to proceed according to the strictest forms of law."

Graffam vs. *Burgess,* 117 U. S., 180.

And see:

Schaferman vs. *O'Brien,* 92 A. D., 708, 711;
Drury vs. *Milwaukee, etc. Ry.,* 74 U. S. (7 Wall.), 299; 19 I. 40.

These elaborate forms, however, are thoroughly understood and completely futile in equity:

"It is the province and delight of equity to brush away mere forms of law. Nowhere is it more necessary for courts of equity to adhere steadfastly to this maxim, and avoid the danger of allowing their remedies to be abused by penetrating all legal fictions and disguises, than in the complex relations growing out of corporate affairs.

Home Fire Ins. Co. vs. *Barber,* 93 N. W. (Neb.), 1024, 1032.

And equity, as already observed, always looks through the form to the substance,—through the ceremonial to the ulterior object: that is to say, even if each act which, in a given case, corporation directors, of their

own motion or at the dictation of their controlling master, propose to do, were conceded to be *intra vires* of the corporation; even if, also, each act proposed to be done were an act which these directors were not incapacitated by their own, or their master's, self interest from doing: still, if the ultimate object which they propose to effect by doing these various acts,—if the situation which by means of these acts they plan to create, or have had planned for them to create, —be injurious to the corporation or its stockholders, the chancellor will intervene to strike the transaction with nullity.

Theis vs. *Durr,* 104 N. W. (Wis.), 985, 988;
Wright vs. *Oroville Mg. Co.,* 40 Cal., 20;
Aikens vs. *Wisconsin,* 195 U. S., 194, 205-6.

The Law as to Corporate Frauds or Breaches of Trust.

Definition of Breach of Trust:

Pomeroy, Sec. 1079.

As applied to Corporate Officers:

Pomeroy, Sec. 1094.

Views of Sanborn, J., as to fiduciaries:

Trice vs. *Comstock,* 121 Fed., 620; 622-3; 626-7.

Views of Sanborn, J., as to Controllers of Corporations:

Wheeler vs. *Bldg. Co.,* 159 Fed., 391; 393-4.

Views of the Supreme Court:

"We have the right to consider facts without particular proof of them, which are universally recognized and which relate to the common and ordinary way of doing business throughout the country."

Peckham, J. Nicol vs. *Ames,* 173 U. S., 517.

"Every holder (of stock) is a *cestui que* trust to the extent of his ownership."

Swayne, J. Farrington vs. *Tennessee,* 95 U. S., 687.

"An essential incident to trust property is that the trustee or bailee can never make use of it for his own benefit. Nor can it be subjected by his creditors to the payment of his debts."

Jackson, J. Strum vs. *Boker,* 150 U. S., 330.

"Undoubtedly the doctrine is established that a trustee cannot purchase or deal in the trust property for his own benefit or on his own behalf, directly or indirectly."

Fuller, C. J. Hammond vs. *Hopkins,* 143 U. S., 251.

"It is a general rule that a trustee cannot deal with the subject of his trust."

Hunt, J. Stephen vs. *Beall,* 22 Wall., 340.

Duties of Trustees:

"The law requires the strictest good faith upon the part of one occupying a relation of confidence to another."

Harlan, J. Wadsworth vs. *Adams,* 138 U. S., 389.

"We should be unwilling to weaken the obligation of good faith and fidelity required by the law of a trustee. We have frequently enforced such obligations in the most rigid manner."

Hunt, J. Stephen vs. *Beall,* 22 Wall., 340.

Parties dealing with Trustee.

"The law exacts the most perfect good faith from all parties dealing with a trustee respecting trust property. Whoever takes it for an object other than the general purposes of the trust, or such as may reasonably be supposed to be within its scope, must look to authority of the trustee, or he will act at his peril."

Field, J. Smith vs. *Ayer,* 101 U. S., 327.

Fraud exists wherever the interests of the corporation are deliberately neglected in favor of a per-

sonal or other interest: that is to say, to quote the language of Mr. Justice Peckham, recently of the United States Supreme Court, fraud exists in any scheme which is oppressive to the corporation or its stockholders, or "so far as opposed to the true in- "terests of the corporation itself as to lead to the "clear inference that no one thus acting could have "been influenced by any honest desire to secure such "interests, but that he must have acted with an intent "to subserve some outside purpose, regardless of the "consequences to the company and in a manner in- "consistent with its interests."

Gamble vs. *Queen's County Water Co.*, 9 L. R. A., 527, 530.

And see, also:

Wheeler vs. *Mg. Co.*, 71 Pac. (Colo.), 1101;
El Capitan Co. vs. *Loan Co.*, 69 Id. (Kans.), 332;
Oliver vs. *Oliver*, 45 S. E. (Geo.), 232;
N. La. Assn. vs. *Milliken*, 35 So. (La.), 264;
Jacobs vs. *Mex. etc. Co.*, 93 N. Y. S., 776;
McCourt vs. *Singer-Bigger*, 145 Fed., 103;
Nat. Co. vs. *Chicago Co.*, 80 N. E. (Ill.), 556;
Pepper vs. *Addicks*, 153 Fed., 383;
Bowers vs. *Male*, 78 N. E. (N. Y.), 577;
Steele vs. *Mg. Co.*, 95 Pac. (Colo.), 349;

Nauces etc. Co. vs. *Davis,* 116 S. W. (Texas), 633;
Penn. Co. vs. *Am. Co.,* 166 Fed., 254;
Mapes vs. *German Bk.,* 176 Id., 89;
In re Swofford Bros., 180 Id., 549;
Montgomery Tr. Co. vs. *Harmon,* 37 So. (Ala.), 371;
Baker vs. *Ducker,* 79 Cal., 365, 374;
Ashton vs. *Dashaway Assn.,* 84 Cal., 61.

This Fraudulent Breach of Trust was participated in by the Howard Bondholders.

Can there be any reasonable doubt about this proposition? Does not the record here establish that these bondholders knowingly dealt, through their agent, Howard, with Dingee in a matter in which they were all interested: that they were not *bona fide* takers of the notes evolved from that transaction: that they took those notes subject to all existing equities in favor of the Standard: that they took those notes to satisfy what, *quoad* the Standard, were wholly foreign claims and demands; that they were not innocent parties: that they had immediate knowledge of all the facts: and that they had knowledge of numerous facts suggesting inquiry to a cautious man, and equivalent to knowledge of all that such inquiry would have disclosed.

1 Cook, Sec. 293, p. 805, n. 1; 3 Id., 2656; 2573-4;

Civil Code, Secs. 18-19;
Kenniff vs. *Caulfield,* 140 Cal., 34, 45-6.

That these Howard bondholders were in intimate touch with the entire situation, from beginning to end, is illustrated throughout the depositions and record by a plenitude of evidence. That this participation in the history and transactions with which we are concerned here was continuous and unbroken, from beginning to end, is evidenced, among other things, by that portion of the Record included between pages 619 and 625. There, we find Howard and Smith, who are acting for these Howard bondholders, supervising the drafting, correction and settlement of the resolutions, notes, etc., to be used at the special meeting and in the consummation of the pre-arrangement which was arrived at on March 25th or 26th, 1908.

The plain truth is that the Howard bondholders not only knowingly participated in this fraudulent breach of trust, but actually insisted upon it; and this, because of their commanding motive—a financial motive: they saw that the N. W. Co. was a failure, that it had nothing to secure them, that its assets were insignificant and its funds misappropriated, and they were anxious to get out of the bad investment, to get rid of the valueless bonds, and to get their money back. They were, therefore, equally guilty with Dingee in this raid upon the Standard, and cannot

recover here; and to allow them to recover here would be to allow them to take advantage of their own wrong, and to put a premium upon fraud. The claims of these Howard bondholders upon these notes against the Standard, find no support in law, equity or good conscience: they exhibit neither honesty in their origin, nor justice in what they seek. No court will give its aid to the consummation of inequitable acts; and no principle is more fundamental than that which bars from courts of justice, whether of law or equity, those whose claims arise from their own wrongdoing.

The settled law accordingly is that all participants in a fraud or breach of trust are equally guilty, and none may derive any advantage therefrom through a court of justice.

Lincoln vs. *Claflin,* 74 U. S. (7 Wall.), 132;
S. D. & T. Co. vs. *Cahn,* 62 Atl. (Md.), 819;
Duckett vs. *Bank,* 63 A. S. R., 513;
In re Prospect Worsted Mills, 126 Fed., 1011;
McCourt vs. *Singers-Bigger,* 145 Id., 103, 110;
Pelton vs. *Lumber Co.,* 112 N. W. (Wis.), 29;
Field vs. *Western etc. Co.,* 166 Fed., 607;
Emerado Co. vs. *Farmers Bk.,* 127 N. W. (N. Dak.), 522;
Wash. Ry. vs. *R. E. Trust Co.,* 177 Fed., 306.

And the views of the Supreme Court are quite harmonious:

Good Faith.

"It is a principle in chancery, that he who asks relief must have acted in good faith. The equitable powers of this court can never be exerted in behalf of one who has acted fraudulently, or who by deceit or any unfair means has gained an advantage. To aid a party in such a case would make this court the abettor of iniquity."

McLean, J. Bein vs. *Heath,* 6 How., 247.

"The rule in equity is very broad to prevent a fraud, which would exist if one was permitted 'to derive a benefit from his own breach of duty and obligation.'"

Woodbury, J. Carpenter vs. *Providence Washington Ins. Co.,* 4 How., 223.

"Parties are not only bound to act fairly in their dealings with each other, but they are not to expect the aid of a court of equity to enforce an agreement made with the intent that it shall operate as a fraud upon the private rights and interests of third persons."

Clifford, J. Selz vs. *Unna,* 6 Wall., 336.

"A court administering justice upon principles of equity will not lend its aid to enforce the ful-

filment of a contract in favor of a party to it, which is founded in fraud."

Nelson, J. Carrington vs. *Pratt,* 18 How., 66.

"A court of equity will not stop halfway in the investigation of a fraud which is quite apparent, to give one of the parties to it affirmative relief at the expense of the other."

Miller, J. Walker vs. *Reister,* 102 U. S., 471.

Offensive Conduct of Plaintiff.

"A court of equity acts only when and as conscience commands, and if the conduct of the plaintiff be offensive to the dictates of natural justice, then, whatever may be the rights he possesses and whatever use he may make of them in a court of law, he will be held remediless in a court of equity.

Brewer, J. Deweese vs. *Reinhard,* 165 U. S., 390.

Agreements by Holders.

"The holders of commercial paper, who enter into agreements or transactions with the makers or indorsers, affecting its validity or negotiability, cannot invoke protection against the infirmity which they have aided to create. There are no considerations of commercial policy which can exclude the parties in such cases from testifying to the facts."

Field, J. Davis vs. *Brown,* 94 U. S., 426.

"One who pays with knowledge of a fraud is in no better position than if he had not paid at all. He has no greater equity, and received no greater protection. Such is the rule as to contracts generally."

Hunt, J. Dresser vs. *Missouri, etc. R. Const. Co.,* 93 U. S., 94.

Solicitude of Courts.

"Parties engaged in a fraudulent attempt to obtain a neighbor's property are not the objects of the special solicitude of the courts. If they are caught in their own toils, and are themselves the sufferers, it is a legitimate consequence of their violation of the rules of law and morality. Those who violate these laws must suffer the penalty."

Hunt, J. Neblett vs. *McFarland,* 92 U. S., 105.

And see, also:

In re Prospect Worsted Mills, 126 Fed., 1011;
McCourt vs. *Singers-Bigger,* 145 Id., 103;
Pelton vs. *Lumber Co.,* 112 N. W. (Wis.), 29;
Field vs. *Western etc. Co.,* 166 Fed., 607;
Emerado Co. vs. *Farmers Bank,* 127 N. W. (N. Dak.), 522;
Wash. Ry. vs. *R. E. Trust Co.,* 177 Fed., 306, 312.

The whole matter is thus summed up by Judge Thompson:

> "Acts of manifest bad faith or breach of duty towards the corporation on the part of the president, are not binding upon it. Strangers who thus participate in a wrong against the corporation, cannot be allowed to profit by it."

10 Cyc., 911: giving many illustrations and citing many cases.

And any person who instigates, connives at, and receives the fruits of, a corporate fraud, participates therein:

Woodroff vs. *Howes,* 88 Cal., 184, 188, 199.

And since I have just mentioned *Woodroof* vs. *Howes,* I may add a remark suggested by that case. We are all familiar with the rule conceded by counsel upon the oral argument that inadequacy of consideration is a factor in determining the presence or absence of fraud; and one supposes that no authorities need be cited in support of so well understood a principle. We have also seen the views of an accomplished Federal Judge as set forth in *Pepper* vs. *Addicks,* 153 Fed., 583; and *Woodroof* vs. *Howes* puts the accent of fraud upon the gross discrepancy which exists in this cause between the actual lack of value of the bonds and stock in question and the price that Dingee, acting through his directors, caused the Standard

to put upon them. This California case in effect holds that to sell land worth Three Hundred Dollars per acre for Thirty Dollars per acre is a fraud upon the corporation: how much worse then, because one happens to control the corporation, to compel it to purchase bonds and stocks which were utterly useless and worthless for any purpose whatever? And how can any participant in such a scheme expect to escape the consequences of his own wrongdoing?

Indeed in *Cropsey* vs. *Johnston,* 100 N. W. (Mich.), 182, it is held that knowingly paying more for corporate stock than it is worth, is a fraud by the trust upon the beneficiary; and this rule would seem to apply with equal force to the act of paying more for corporate bonds than they are really worth.

IV.

THE CONTENTIONS HERETOFORE PRESENTED HAVE AN IMPORTANT BEARING UPON THE LAW OF ESTOPPEL AND RATIFICATION.

(a) *The Real Scope and Limitations of the Law of Rescission.*

It is often loosely said that before one can rescind, he must restore all that he has received: but since this doctrine has been so frequently, and so successfully, used to shield the party guilty of fraud, it is not strange that the modern authorities have put very marked limits upon the doctrine itself. The origin of

the old rule lay in the fact that a common law court could not rescind, but could only treat as void that which was absolutely void *ab initio;* and therefore one who had received anything under a fraud practised must return to the rogue what the rogue had given him before he could begin to reclaim what the rogue had got from him: but the best considered cases in equity never have required anything like this, as we shall see as the discussion proceeds. Indeed, in equity, the *status quo* rule is rather an incident to, than a condition of, the relief (*Brown* vs. *Norman,* 4 So. (Miss.), 293), and that equity itself is available to meet the equities of each case, and concerns itself only with the things that were actually received. And in illustration of the tendency of modern courts to restrict the operation of the rule in question, and to increase the exceptions to it, we call attention to the following passage from a recent California case:

> "Section 1691 of the Civil Code states the general rule applicable to one desiring to rescind. He must rescind promptly upon discovering the facts which entitle him to rescind, and he must restore to the other party everything of value which he has received from him under the contract, or must offer to restore the same, upon condition that such party shall do likewise, unless the latter is unable or positively refuses to do so. It will be assumed, in accord with the views expressed by this court in several cases, that one invoking the aid of equity to obtain a decree of

rescission must comply with this rule as a condition precedent to action, except in exceptional cases where, by reason of the circumstances, restoration or offer to restore is not essential, and that in this regard there is no distinction between an action on the equitable side of the court to obtain a decree of rescission and an action maintained on the theory that a rescission has been fully accomplished by the acts of the party. (*Kelley* vs. *Owens,* 120 Cal., 502, (47 Pac., 369, 52 Pac., 797); *Westerfeld* vs. *New York Life Ins. Co.,* 129 Cal., 68, 84, (58 Pac., 92, 61 Pac., 667); *Toby* vs. *Oregon Pacific R. R. Co.,* 98 Cal., 490, 499, (33 Pac., 550).) These rules are based on the equitable doctrine that he who seeks equity must do equity, and are applicable in every case where compliance therewith can be had without injury to the rights of the rescinding party and is essential to the protection of the other party. There are, however, exceptions to the rule as to restoration, also founded on equitable considerations. In *Kelley* vs. *Owens,* 120 Cal., 502, (47 Pac., 369, 52 Pac., 797), this court recognized the existence of such exceptions in the following language: 'There are exceptional cases where restoration or an offer to restore before suit brought is not necessary—as for instance, where the thing received by the plaintiff is of no value whatever to either of the parties; or where the plaintiff has merely received the individual promissory note of the defendant; or where the contract is absolutely void; or where it clearly appears that the defendant could not possibly have been injuriously affected by a failure to

restore; or where, without any fault of plaintiff, there have been peculiar complications which make it impossible for plaintiff to offer full restoration, although the circumstances are such that a court of chancery may by a final decree fully adjust the equities between the parties—and it will be found that such instances, or others similar to them in principle, are those to which the authorities cited by appellants generally relate.' Some of the cases thus instanced are excepted by the terms of the statute, as in the case where the thing received by the plaintiff is of no value whatever to either party, but others are not. It is settled by our decisions that one attempting to rescind a transaction on the ground of fraud is not required to restore that which, in any event, he would be entitled to retain. (See *Matteson* vs. *Wagner,* 147 Cal., 739, 743, (82 Pac., 436), and cases there cited). This is upon the theory that the defendant could not possibly have been injuriously affected by the failure to restore, and the plaintiff might be, for he might not be able to again collect the amount from the defendant, if it should be so restored to the defendant. One of the exceptions recognized in *Kelley* vs. *Owens* is where, without any fault of plaintiff, there have been peculiar complications which make it impossible for plaintiff to offer full restoration, although the circumstances are such that a court of chancery may by a final decree fully adjust the equities between the parties. (See, also, *Thackrah* vs. *Haas,* 119 U. S., 499, (7 Sup. Ct., 311; *Wills* vs. *Porter,* 132 Cal., 516, 521, (64 Pac., 896).) Another exception recognized by this

court is that of the case where the taking of an account is necessary for the ascertainment of the sum to be repaid, or the sum is to be liquidated by an adjudication based on evidence of facts independent of the terms of the contract itself. In such a case, as the plaintiff cannot determine in advance of the suit the amount by him to be repaid, an offer to refund such sum as shall be decreed is a sufficient offer to do equity. (*Sutter St. R. R. Co.* vs. *Baum,* 66 Cal., 44, (4 Pac., 916).) The authorities fully sustain the proposition that an offer to restore before action is not essential where the rights of the other party can be fully protected by the decree, and such restoration cannot be made without injuriously affecting the rights of the party seeking rescission, or the relative rights of the parties in the event of a recission cannot be determined without an accounting. The statute itself dispenses with the necessity of such an offer where the other party is himself unable to restore what he has received. In such event an offer on the part of the rescinding party would be a vain thing, and the respective rights of the parties can be fully guarded by the decree."

California etc. Co. vs. *Schiappa-Pietra,* 151 Cal., 732-739-741.

In direct line with these views of the Supreme Court of California we call attention to the following passage from a very recent New York case:

"The *statu quo* doctrine is thus based on the broad principles that one electing to rescind an

existing contract cannot at the same time in effect take the opposite position of affirming the contract by retaining anything of value obtained through it, nor should he be allowed to profit in the same manner by the very fraud he charges against another. Whenever, therefore, the innocent party has obtained under the contract definite property which can be returned upon the recission of the contract, the *statu quo* doctrine may be strictly and easily applied, but there are obviously many cases in which any such exact and literal return is impossible and it thus becomes necessary to examine the limitations of the doctrine.

"Although the rule states that the guilty party is to be restored to his original position, the reason for the rule as shown is not that any particular regard or consideration is due him, but simply that the attitude of the defrauded party upon bringing his action may conform to basic principles of pleading and equity, and not be open to criticism in these respects, as would be the case if he were allowed to retain property that came into his hands through the very fraudulent instrument that he would seek to avoid. But, if the attitude of the innocent party is not open to the objections mentioned, if he does not possess and so is not seeking to retain anything that would imply an affirmance of the contract or that would be inequitable for him to keep, the reason for the doctrine falls, and the doctrine itself becomes inapplicable. In such case the plaintiff's right of action is entirely unaffected by any consideration as to whether or not the de-

fendant is or may be put in exact *statu quo*. If he is not or cannot be so placed, he has only himself to blame. An innocent party cannot be in any way prejudiced in his right of action by the fraudulent acts of the other party to the suit. The cases accordingly clearly recognize this important limitation to the *statu quo* doctrine."

Moore vs. *Mutual Reserve Fund Life Ass'n.*, 106 N. Y. S., 255, 258;

And see, also:

Hammond vs. *Pennock,* 61 N. Y., 145, 152-4.

And a very clear comment upon the proposition that the rule is inapplicable where the defendant could not have been injuriously affected by the failure to restore, or where conditions proper for the protection of the defendant could be inserted in the judgment ultimately recovered, will be found in *Matteson* vs. *Wagoner,* 147 Cal., 739, 744, 745, the Court adding that, "Under the prayer for general "relief, the Court can give such judgment as plain- "tiffs show themselves entitled to, and as may be "necessary to effect justice between the parties and "protect the rights of both." It may be added, in passing, that the authority last cited quite plainly disproves *Marten* vs. *Burnes Wine Co.,* 99 Cal., 356, one of the authorities cited by counsel upon the other side.

And so, also, in another recent case, it was ob-

served that "if equity can still be done between the parties, courts will grant relief to the defrauded party."

Green vs. *Duvergey,* 146 Cal., 379, 389-391.

Indeed, it is sufficient if, "upon the trial" a plaintiff should offer to return (*McDonald* vs. *Pacific Debenture Company,* 146 Cal., 667, 672).

(b). *The doctrine contended for is inapplicable here, because the Standard Portland Cement Corporation could not return something which the Standard Portland Cement Corporation had never received.*

Moore vs. *Mutual Reserve Fund Life Assn.,* 106 N. Y. S., 255, 258.

Whatever may or may not have been the moral quality of Dingee's conduct with reference to these bonds and stocks, in doing what Young relates without contradiction from counsel, still the question remains, what has that to do with the Standard Corporation? Conceding Dingee's wrong to the fullest extent, still the bonds and stocks never got into the treasury of the Standard, or were received or accepted by it, or ever passed into its possession or under its control. The vice of the contention upon the other side lies in the assumption that a physical receipt by Young, if there was one, is necessarily a receipt by the Standard: but where the facts are as related without contradic-

tion in the testimony of Young, and while Dingee was active in furthering the purpose agreed upon at the meeting of March 25-26, 1908, it cannot, without doing violence to the record, be concluded that these bonds or stocks ever got anywhere except where Young says they got, namely, into the treasury of the N. W. Co. And if these documents passed into the treasury of the N. W. Co., they plainly did not pass into that of the Standard; and the Standard therefore could not return something which the Standard itself had not received.

(c). *The doctrine contended for is inapplicable here for the reason that the alleged securities were of no value to either party.*

Cal. etc. Co. vs. *Schiappa-Pietra,* 151 Cal., 732, 739.

The discussion heretofore had will throw considerable light upon the suggestion now made; and that discussion exhibits the worthlessness of the bonds and stocks in question to any person whatever. Evans' own conduct, his acute anxiety to get rid of these bonds and stocks, his swift concert in the plan formulated in March, 1908, and his ready acceptance of the unsecured one year note of the Standard in preference to the secured bonds and the stock of the N. W. Co.,—all these things, together with others which manifest themselves throughout the record,

make it very clear indeed that these bonds and stocks were not only of no value to Evans, but were thoroughly understood by him to be of no value. And all of these considerations concur to make it clear that the bonds and stocks were of no value to the Standard Corporation. As Evans knew, and as Dingee knew, and as Howard knew, the North Western enterprise was abandoned: Evans flatly refused to accept Dingee's assurances that the work would go on in the future: the Company was insolvent: its assets were insignificant: its property had been embezzled and misappropriated: all operations at Kendall had ceased: the Standard itself was in a depressed financial condition: how then could the bonds of this insolvent failure be of any value to the Standard? The N. W. Co. was worse than dead, it was rotting: Dingee had stolen right and left: he stole for the Santa Cruz Company: he stole to buy the Bellingham Bay and British Columbia stock, taking the stock in his own name as trustee: and then he stole that stock to make it part of the pledge to the American Bridge Company: and he was thoroughly familiar with the wretched conditions which characterized the North Western Company enterprise. A bond, after all, is nothing more than a promise secured by the assets of the promisor; but of what value to anybody, particularly to the Standard, were the promises of the bonds of such a disastrous fiasco as the N. W. Co. enterprise?

If the value be what an object is worth in money, then who could sell, or who would buy, such worthless things as these North Western bonds or stocks? If value depend in use, then to what uses could these wretched bonds and stocks be put? What sane bank, for instance, would accept them as collateral? What sane trustee would select them as investments for trust funds? Counsel talks about absolute worthlessness: but while we regard these bonds and stocks as absolutely worthless, still there may be a point of view from which nothing in this world, however worthless otherwise, is absolutely worthless. In other words, value, if it have any meaning, must mean available value. These bonds and stocks are not worthless as pipe-lights. A man might twist up one of these bonds, stick it into the fireplace, and light his pipe with it: it might not be worthless for that purpose. If some one threw a rock through my window, I might paste one of these bonds over the hole in the windowpane and thus keep out the draft: the bonds or certificates of stock might not be worthless for that purpose. And in this way it might be said that there is no such thing as absolute worthlessness. But for all reasonable, practical, business purposes, a thing may be entirely worthless, although it might be utilized as a pipe-light or a stop-gap in the window. Value, in other words, must mean available value, in a reasonable, practical, business sense. Let us illustrate our meaning by reference to an actual condition of fact

which is to be found in the Federal Reporter. In the case of *Pepper* vs. *Addicks,* 153 Fed., 383, it was held that where the defendant, an officer and director of a corporation, absolutely dominated its Board of Directors, and induced such Board to authorize the purchase of worthless bonds of other corporations in which he was interested, by which he was enabled to make a large individual profit, he became liable to the operation of certain well known equitable doctrines. Now, in this case, the bonds were determined by the learned Judge who decided the cause, to be worthless: what then was the learned Judge's conception of worthless bonds? We think it will be sufficient for our purposes to extract from the decision in question, and present the same in parallel columns, the points of resemblance between the worthless bonds there, and the worthless bonds here.

QUEEN CITY GAS LIGHT COMPANY.	NORTH WESTERN PORTLAND CEMENT COMPANY.
Incorporated: February 15, 1893.	Incorporated: August 27, 1906.
Capital stock: $50,000.	Capital stock: $5,000,000.
Number of shares: 500.	Number of shares: 50,000.
Par Value: $100.	Par Value: $100.
Purpose: Manufacture and Sale of Gas.	Purpose: Manufacture and Sale of Cement.
Place: Buffalo, New York.	Place: Kendall, Washington.

Plant Built: 1897.
Cost of Plant: $180,000.
Amount of Business: Very Little.
Bond Issue: $1,000,000.
Security: Very Little.

Plant Built: Never built.
Cost of Plant: $58,800.
Amount of Business: None.
Bond Issue: $2,000,000.
Security: Very Little.

Value of Bonds:

"It did a little business, "but never paid operating "expenses, and it had "very little of value to "offer as security for an "encumbrance of $1,000,- "000. No one would "have taken the bonds, "except as a venturesome "speculation, or as part "of a scheme which con- "templated further steps "before success should be "attained. The purchase "of $1,000,000 of such "bonds at par, standing "by itself, would be an "act either reckless in the "extreme, or suggesting "combination for some "purpose between the "buyer and the seller" (page 386).

Passing to the other corporation involved in the *Addicks* case, we have the following significant exposures:

PEOPLE'S GASLIGHT AND COKE COMPANY.	NORTH WESTERN PORTLAND CEMENT COMPANY.
Incorporated: November 2, 1897.	Incorporated: August 27, 1906.
Capital Stock: $3,000,000.	Capital Stock: $5,000,000.
Purpose: Manufacture and Sale of Gas.	Purpose: Manufacture and Sale of Cement.
Place: Buffalo, New York.	Place: Kendall, Washington.
Cost of Plant: $500,000.	Cost of Plant: $58,800.
Gross Earnings: Nine Months: $4,223.36.	Gross Earnings: Any Number of *Months*: Nothing.
Only moneys Received by Company: Proceeds of Bond Issue.	Only moneys Received by Company: Proceeds of Bond Issue.
Bond Issue: $2,100,000.	Bond Issue: $2,000,000.
Security for Bonds: Plant and Franchise of People's Gaslight and Coke Company and of Queen City Gas Light Company, the two plants aggregating: $680,000.	Security for Bonds: Present and after-acquired property of Company.
Value of Bonds: "These bonds had little	

"intrinsic value. The "issue was $2,100,000, and "the plant and other "property back of them "was not worth one-third "of this sum, even if ap- "praised as worth all the "money that had been put "into the enterprise. Con- "sidering the property as "income producing and "as security for an in- "vestment, it would not "bear investigation for a "moment. It was purely "a speculative scheme, "and except in this as- "pect, its bonds were "worthless" (p. 396).

And we know that Mr. Evans did not go into the North Western as "purely "speculative scheme:" as he says himself "I sub- "scribed my money for "legitimate commercial "purposes."

It may be observed, in passing, that Evans undertakes to tell us (Record, Vol. I, p. 193) that the North Western bonds were worth more than the Standard notes: but of course, this dress-parade statement is contradicted, not only by the whole history of the case, and by Evans' own conduct and demeanor in and about these bonds, but also by the declarations

of Howard himself. There was, plainly, no other consideration for the notes in suit except the bonds and stock, and since they were wholly worthless, the rule contended for would be wholly inapplicable (*Field* vs. *Austin,* 131 Cal., 379).

(d) *The rule contended for is inapplicable here because it clearly appears that neither Evans nor his assignors could possibly have been injuriously affected by a failure to restore.*

California etc. Co. vs. *Schiappa-Pietra,* 151 Cal., 732, 739, *ad finem.*

Of course, the record here makes no attempt to show that either Evans or his assignors have been in any way injuriously affected by any failure upon the part of the Standard Corporation to return the bonds and stocks in question, assuming that the Corporation ever had those bonds and stocks in its possession so that it could return the same. Indeed, it would have been the climax of absurdity had Evans or his assignors attempted any such thing. Had any interest been paid upon these bonds, had these stocks earned any dividends, had the N. W. Co. any productiveness, which, by a failure to return, Evans or his assignors were deprived of, one might understand the claim that they were injuriously affected by the failure to return: but the entire history of the N. W. Co. has been one long shocking story of loot,

embezzlement, spoliation and dishonesty. It never earned a dollar: it never declared a dividend: it never turned out a pound of cement: it never was in a position where it could turn out a pound of cement or earn a single dollar: it was a pronounced and unqualified failure; and had Mr. Evans and his assignors never entered into the preconcerted arrangement of March, 1908, and had they continuously retained in their possession these bonds and stocks, their position would have remained precisely the same. The compelling facts which are disclosed by the record in this cause make it entirely clear that, assuming that the Standard Corporation ever received the bonds and stocks in question, no failure to return the same could in any way have injuriously affected Evans or his assignors.

(e). *The rule contended for is inapplicable here because without any fault on the part of the Standard, there have been peculiar complications which make it impossible for the Standard to restore.*

California, etc. Co. vs. *Schiappa-Pietra,* 151 Cal., 732, 739-740.

These matters have already heretofore been discussed in pointing out that by reason of a combination of acts by Evans, Norcross and Dingee, the bonds and stocks in question never got into the treasury of the Standard, but passed into that of the North Western. Whether those bonds and stocks be treated as in the

treasury of the N. W. Co., or as in the possession of Mr. Young as bailee for whomsoever the law shall declare to be their owner, matters but little so far as the Standard Corporation is concerned: however, these things may or may not be, those bonds and stocks are not in the possession or in the treasury of the Standard Corporation.

(f.) *The rule contended for is inapplicable here because under the circumstances a Court of Chancery may by a final decree fully adjust the equities between the parties.*

Cal. etc. Co. vs. *Schiappa-Pietra,* 151 Cal., 732, 740.

In this connection, it may be pointed out that the relief allowed in equity is determined by the situation presented to the Chancellor at the time of the decree, not at the beginning of the litigation. In other words, the status of the cause and the parties, at the date of the institution of the suit, does not control the Court, but that the Court is controlled by the status of the case and the parties at the time of the decree.

Superior Oil & Gas Co. vs. *Mehlin,* 108 Pac., 545, 547.

Little vs. *Cunningham,* 92 S. W. (Mo.), 734, 736.

In view of these principles, it may be said that if,

notwithstanding our construction of the facts, it should be judicially determined that the bonds and stocks in question are actually in the possession of the Standard Corporation, then the Standard Corporation would be in a position to return those bonds and stocks to Evans and his assignors. Should this condition of things develop, the Standard Corporation will then restore and redeliver to Evans and his assignors the bonds and stock in question. Under all the authorities, this may be done at any time prior to the actual entry of the decree.

(g) *The doctrine contended for is inapplicable here for the reason that the notes sued on are absolutely void.*

California etc. Co. vs. *Schiappa-Pietra,* 151 Cal., 732, 739, *ad finem.*

And we insist that the contracts, so-called, involved in this cause are absolutely void:

1. Because of the antagonism of the alleged notes to settled public policy;

2. Because said notes are entirely without consideration;

3. Because there never was any real delivery of said note, to said Corporation;

4. Because said notes were and are the progeny of

a corporate fraud participated in by the persons now seeking to enforce them.

It is highly important to observe that these alleged notes are void, because the public policy of this State does not permit notes tainted with illegality to furnish the basis for a recovery. From the record here, it must, we think, be obvious that these Howard bondholders entered into the Kendall project with very great expectations: that they expected not alone an acceptable investment in the bonds, but also a profitable speculation through the acquisition of the bonus stock: that they looked upon Dingee in the beginning as the coming man in the cement enterprise—as the future cement king of the Pacific coast: that they looked forward to the acquisition of the Northern cement market by the new concern; and that they glowed with hopes for the future, and were only too willing to take the bonds and acquire the bonus stock. But a change came over the spirit of their somewhat iridescent dream: there came the failure to make progress at Kendall: there came evil tales of the failure to pay men starving at Kendall: there came ominous talk about the imposition of liens: Dingee had been looting the North Western funds and stealing them for alien purposes: the air was filled with the complaints of the bondholders: letters were sent to Dingee proposing the return of the bondholders' money, but these letters were ignored by him: then

came the Wenzelburger investigation; and this revealed the full extent of Dingee's embezzlement. Can any reasonable man doubt the effect of all these things upon the minds of the bondholders? Taking Evans as a typical illustration, is it at all surprising that he should become "very sore"? Did he not lose all confidence in Dingee, and refuse to accept Dingee's assurances that the work would go on at Kendall? Did he not think it best to get rid of these bonds? The bondholders never stopped to chaffer about the stock of that decrepit jerkwater concern known as the Bellingham Bay & British Columbia Railway, or about claims by the North Western Company against any other person or corporation: they knew that the railway was controlled only to be sold, that Howard did not wish it to be encumbered by a burdensome cement contract which might make it unattractive to prospective purchasers, and that all the moneys used by Dingee for its purchase were never directed by the Company to be diverted into any such channels; and what they looked at were not the specious afterthoughts conjured up by counsel to meet the exigencies of this case, but what they looked at was that failure at Kendall which sent glimmering their stock speculation, and which stripped their bonds of value. Is one then to wonder that they became "very sore," and that their minds were charged with thoughts of Dingee's criminal responsibility?

In illustration of this, consider Evans' attitude dur-

ing the months of January, February and March, 1908. In January, 1908, he writes this significant language to Howard:

> "I regret that I shall be unable to get away from here before 22nd proximo, and it is doubtful if I shall be able to get away then, but I intend going to San Francisco as soon as I possibly can, when, if I get no satisfaction in the meantime, I intend to get some satisfaction out of Mr. Dingee, even if I have to go to the expense and worry of getting it through the courts" (Letter January 29, 1908: Record, Vol. II, p. 537).

And again, in February, 1908, he lets in the light upon what was in his mind, in the following passage:

> "I duly received your favor of the 4th inst., and note all you write with regard to North Western Portland Cement Company. It seems to me that there should be no delay in bringing this matter to a head, and what I would suggest is, that you call all your friends together, to whom you sold the bonds, and tell them frankly what your suspicions are, and arrange for some lawyer to go ahead on their behalf, on the understanding that they contribute pro rata to the expense according to their holdings of bonds. If Mr. Dingee has used the money other than for the purposes for which it was subscribed, I take it that he is criminally liable that he should either be made to refund the money without delay, or failing this, criminally prosecuted" (Letter February 10, 1908: Record, Vol. II, p. 546).

And again, in March, 1908, he recurs to the subject in the following language:

> "I duly received yours of 27th ultimo enclosing Certificate No. 196 for 150 shares in the North Western Portland Cement Company, endorsed by Mr. A. Wenzelburger, together with copy of this gentleman's report. I have had no time to thoroughly go into same, but the first glance shows me that my suspicions are more than confirmed, and that Mesrs. Dingee and Bachman have been using the money for their own personal benefit, and according to the laws of this country are criminally liable, and if they were here, they would either have to make the money good within 48 hours, or they would be arrested" (Letter March 4, 1908: Record, Vol. II, p. 549-550).

And this is the letter which Howard transmitted from New York to Dingee in San Francisco, thus communicating to the man who had done the wrong, and who well knew he had done the wrong, the state of mind of the man whom he had wronged.

And so, too, the same thought permeated Percy's mind; and Ernest had no secrets from Percy, as we have seen. And Percy, as late as February, 1909, expresses his views in the following passage:

> "Of course, I am very anxious to know how you are getting on with that unfortunate Dingee affair. I did hear indirectly that you had secured a mortgage on his property near Redwood City, and if

such is the case, I suppose we can consider ourselves amply secured; if you have not, then I for one would be in favor of pushing Dingee to the utmost point, even going so far as to put him in jail if it were possible, and I know my partners feel the same way. Surely something can be done at once on account of delinquent interest" (Letter February 8, 1909: Record, Vol. III, p. 895).

And Howard's explanations throw further light upon the state of Evans' mind: he holds out hopes to Evans: he admits the "wrong;" and he concedes the inadequacy of the investment at Kendall.

Of course, at this time, Dingee was in no position to encounter a criminal prosecution, and a criminal prosecution would merely have precipitated his ruin: he was then a fiduciary of the North Western, the Santa Cruz and the Standard corporations: he was a financial wreck: he was in a state of great mental disturbance, distress and great mental anxiety: he was carrying a very heavy load and needed time, and his governing desire was to conciliate Howard and to placate the Howard bondholders.

Now, if the consideration for a note were contrary to public policy, or illegal, that note could not be made the basis of any action legal or equitable; and it would be the duty of the Court, upon the illegality appearing, to withhold all relief; and neither the silence nor the consent of the parties would justify the Court in retaining jurisdiction of such an action.

Ball vs. *Putnam,* 123 Cal., 134;
Union Collection Co. vs. *Bickman,* 150 Id., 159, 165;
Prost vs. *More,* 40 Id., 347;
Morrill vs. *Nightengale,* 93 Id., 452;
Leonis vs. *Walsh,* 140 Id., 175.

The doctrines of estoppel, laches, ratification and the like, have no application to a contract void because in violation of public policy, or because illegal, because such a contract has no legal existence, no action or inaction of a party to it can validate it, and no conduct of a party to it can be invoked as an estoppel against asserting its invalidity. While the courts will not aid either party to an illegal transaction where they stand in *pari delicto,* still this rule applies only where the parties thus stand, or, in other words, where the illegal transaction is entered into voluntarily and the turpitude of the parties is mutual: but where the party seeking relief was not a free moral agent, and its apparent consent to the illegal transaction was obtained through pressure or control, it cannot be regarded as in *pari delicto* with those who obtained its apparent consent by the employment of such means, and it will not be precluded from invoking affirmative relief in equity to set aside the contract, or from defeating the attempted enforcement thereof. That Dingee criminally misappropriated the funds of the North Western Portland Cement Company, is a postulate in

this cause: and if these Howard bondholders, well knowing this from Wenzelburger's report and other sources, instead of prosecuting him therefor, took advantage of his distress to approach him with suggestions of his criminal liability and prosecution upon their lips, and with the keys of the penitentiary jingling in their pockets and, actuated by a selfish and personal motive, treated with him for their own advantage until they succeeded in having the consequences of his sins transferred to an innocent corporation by the enforced issuance of its notes, could any just man claim legality for such a transaction, or seriously assert that it be validated by any process of estoppel, laches, ratification or the like? Dingee was made to understand that if he did not take up these bonds, depreciated by his derelictions, by putting the burden of paying for them at par and with accumulated interest upon a disconnected and innocent corporation at that time under his control, then he should not be surprised at any course the bondholders might take; and these bondholders not merely insinuated but said that they held in their hands the means of prosecuting him criminally. But we take it to be the law, as dictated by the soundest considerations of policy and morality, that you shall not make a trade of a felony. If you are aware that a crime has been committed, you shall not convert that crime into a source of profit or benefit to yourself. But that was the real position in which these bondholders stood. They

knew full well that they had before them, in the person of Dingee, the despoiler of the funds of the North Western Portland Cement Company; and they converted that fact into a source of benefit to themselves by compelling him to compel the Standard Corporation to issue the notes in question; and if these men are permitted to trade upon their knowledge of Dingee's wrongdoing and to convert his wrongdoing into an occasion of an advantage to themselves, no greater legal or moral offense could be committed.

A leading case upon the subject, and one very frequently cited by courts and text writers is the case of *Williams* vs. *Bayley,* L. R., 1 H. L., 200; and the reasoning upon which the decision is based is so clear and cogent, that we take the liberty of setting it forth somewhat at length.

It was an appeal from a decision by which certain agreements were declared void. A son carried to bankers of whom he, as well as his father, was a customer, certain promissory notes with his father's name upon them as endorser. These endorsements were forgeries. On one occasion the father's attention was called to the fact that a promissory note of the son, with the father's name on it, was lying at the bank dishonored. He seemed to have communicated the fact to the son, who immediately redeemed it; but there was no direct evidence to show whether the father did or did not really understand the nature of the transaction. The fact of the forgery was after-

wards discovered; the son did not deny it; the bankers insisted, though *without any direct threat of a prosecution,* on a settlement to which the father was to be a party. He consented, and executed an agreement to make an equitable mortgage of his property. The notes, with the forged endorsements, were then delivered up to him.

A decree of the Vice Chancellor declaring the agreements void was affirmed. The opinion of Lord Chancellor Cranworth, after referring to the principal facts in the case, drew therefrom certain conclusions which seem to us very applicable here. The Lord Chancellor said (p. 209):

> "If the signatures were forgeries, then the bankers were in this position: that they had the means of prosecuting the son. That was clear. Now, the question is, what was the sort of influence which they exercised on the mind of the father to induce him to take on himself the responsibility of paying these notes? Was it merely, we do not know these to be forgeries, we do not believe them to be so, but your son is responsible for them, and if you do not help him we must sue him for the amount? Or was it, if you do not pay these notes we shall be in a position to prosecute him for forgery, and we will prosecute him for forgery? What is the fair inference from what took place? . . . I do not know what may be the opinion of the rest of your Lordships, but I very much agree with the argument of Sir Hugh Cairns of

counsel for appellants, that it is not pressure in the sense in which a Court of equity sets aside transactions on account of pressure, if the pressure is merely this: 'If you do not do such and such an act, I shall reserve all my legal rights, whether against yourself or against your son.' If it had only been, 'If you do not take on yourself the debt of your son, we must sue you for it,' I cannot think that that amounts to pressure, when parties are at arms' length, and particularly when, as in this case, the party supposed to be influenced by pressure had the assistance of his solicitor, not, indeed, on the first occasion, by afterwards, before anything was done. But if what really takes place is this: If you do not assist your son, by taking on yourself the payment of these bills and notes on which there are signatures which are said, at least, to be forgeries, you must not be surprised at any course we shall take; meaning to insinuate, if not to say, we shall hold in our hands the means of criminally prosecuting him for forgery. *I say, if it amounts to that, it is a very different thing.*"

The Lord Chancellor then, after reviewing in detail a number of the conversations and incidents in connection with the transaction, proceeds to say:

"Is that, or is it not, legal? In my opinion I am bound to go to the length of saying that I do not think it is legal. I do not think a transaction of that sort would have been legal even if, instead of being forced on the father, it had been proposed by him and adopted by the bankers. . . .

> Now, is the agreement in question, or is it not, one the object of which is to stifle a criminal prosecution? If there be any case in which that character can properly be given to an agreement, I think that this is such a case, and therefore, in my opinion, the decree is perfectly right. . . . I have therefore no hesitation in moving your Lordships that this appeal be dismissed with costs, and that the decree be affirmed."

In the concurring opinion of Lord Westbury, it is said (p. 216):

> "There are two aspects of this case, or rather two points of view, in which it may be regarded. One of them is: Was the plaintiff a free and voluntary agent, or did he give the security in question under undue pressure exerted by the defendants? That regards the case with respect to the plaintiff alone. The second question regards the case with reference to the defendants alone. Was the transaction, taken independently of the question of pressure, an illegal one, as being contrary to the settled rules and principles of law?"

The opinion then, after reviewing and commenting upon some of the salient facts of the case pertinent to the inquiry, continues (p. 218):

> "The question, therefore, my Lords, is whether a father appealed to under such circumstances, to take upon himself an amount of civil liability, with the knowledge that, unless he does so, his son

will be exposed to a criminal prosecution, with the certainty of conviction, can be regarded as a free and voluntary agent? *I have no hesitation in saying that no man is safe, or ought to be safe, who takes a security for the debt of a felon, from the father of the felon, under such circumstances.* A contract to give security for the debt of another, *which is a contract without consideration,* is, above all things, a contract that should be based upon the free and voluntary agency of the individual who enters into it. But it is clear that the power of considering whether he ought to do it or not, whether it is prudent to do it or not, is altogether taken away from a father who is brought into the situation of either refusing, and leaving his son in that perilous condition, or of taking on himself the amount of that civil obligation.

"I have, therefore, in that view of the case, no difficulty in saying that, as far as my opinion is concerned, the security given for the debt of the son by the father under such circumstances, was not the security of a man who acted with that freedom and power of deliberation that must, undoubtedly, be considered as necessary to validate a transaction of such a description."

The opinion then proceeds to consider the other aspect of the case: "Was the transaction, regarded in- "dependently of pressure, an illegal one, as being "contrary to the settled rules and principles of law?" On this point the distinguished jurist says (p. 219):

"Now I concur in a good deal that was said

by the learned counsel for the appellants, namely, that *if there be an existing debt,* to which is superadded an independent security, or if there be a valid legal document in existence, and then a transaction which is open to the charge of forgery, the contract touching the existing debt is not affected by the superadded engagement which may be invalid on the ground of forgery. For example, if I have lent a man £10,000 on the security of an insufficient estate, and he, some time afterwards, brings me a bill of exchange with a forged acceptance, to induce me to forego exercising my right with respect to the mortgage, that mortgage will not be affected by the forgery, and, I may abstain from dealing with the forgery, and, nevertheless, pursue my remedies on the original contract. *But this is not a case where the bankers are proceeding as against the person liable to them on a contract independent of the forgery. We must take the nature of the contract from the agreement which was entered into, the original agreement, written at the moment,* which no doubt clearly expresses what was in the mind of the father. The liability of the father is created in this memorandum, in which, addressing the bankers, the father says: 'In consideration of your consenting to give up to me the several undermentioned bills and promissory notes, I hereby charge my colliery.' It is impossible, therefore, to have any hesitation as to the fact that the liability of the father is obtained entirely by the consideration of the bankers delivering up the acceptance. That is a wholly different

case from the one to which I have referred, as put in the argument at the bar.

"Now such being the nature of the transaction, I apprehend the law to be this, and unquestionably it is a law dictated by *the soundest considerations of policy and morality: that you shall not make a trade of a felony. If you are aware that a crime had been committed, you shall not convert that crime into a source of profit or benefit to yourself.* But that is the question in which those bankers stood. They knew well, for they had before them the confessing criminal, that forgeries had been committed by the son, and they converted that fact into a source of benefit to themselves by getting the security of the father. Now that is the principle of the law and the policy of the law, and it is dictated by the highest considerations. If men were permitted to trade upon the knowledge of a crime, and to convert their privity to that crime into an occasion of advantage, no doubt a great legal and a great moral offense would be committed. And that is what I apprehend the old rule of law intended to convey when it embodied the principle under words which have now somewhat passed into desuetude, namely, 'misprision of felony.' That was a case when a man, instead of performing his public duty and giving information to the public authorities of a crime that he was aware of, concealed his knowledge, and, farther, converted it into a source of emolument to himself.

"It is impossible, therefore, if you look at this matter wholly independently of the question of pressure, and confine your attention to the act of

the bankers alone, not to come to the conclusion that a great *delictum* was committed when the transaction is viewed simply with reference to the course which they took. . . .

"My Lords, I regard this as a transaction which must necessarily, for purposes of public utility, be stamped with invalidity, because it is one which undoubtedly, in the first place, is a departure from what ought to be the principles of fair dealing between man and man, and it is also one which, if such transactions existed to any considerable extent, would be found productive of great injury and mischief to the community. I think, therefore, that the decree which has been made in this case is a perfectly correct decree.

"I do not mean for one single moment, by anything I have said, to cast any imputation on the character of these gentlemen. I am only dealing with abstract principles of law. They might, perhaps, fairly have thought that they were doing the best for the family of Mr. William Bayley and for the father. I beg particularly that it may not be understood that I mean to convey, by any words that I have used, any reproach on their character. I have used those words as necessary to vindicate the policy and justice of the rule of law, and to show how highly requisite it is that a court of equity should undo a transaction such as this, whether it is regarded as proceeding from a father who cannot be considered as a voluntary agent, or, taking the other aspect of it, as violating the rules of law which prescribe the duties of individuals under such circumstances. On both of

these grounds I think that this is a transaction which ought to be set aside."

The doctrine of this case is thoroughly supported by many well considered authorities, some of which may here be cited:

Colby vs. *Title Insurance & Trust Co.*, 160 Cal., 632;
Morrill vs. *Nightingale,* 93 Id., 452;
Allen vs. *Leflore County,* 31 So. (Miss.), 815;
Koons vs. *Vancousant,* 95 A. S. R. (Mich.), 438;
Gray vs. *Freeman,* 84 S. W. (Tex.), 1105;
Schoener vs. *Lessauer,* 13 N. E. (N. Y.), 741;
Bryant vs. *Peck,* 28 N. E. (Mass.), 678;
Bell vs. *Campbell,* 45 A. S. R. (Mo.), 505.

On the proposition that express threats of criminal prosecution are unnecessary, see:

Meech vs. *Lee,* 46 N. W. (Mich.), 383;
Paris vs. *Carmody,* 131 Mass., 51;
Foley vs. *Greene,* 51 Am. Rep. (R. I.), 419;
Benedict vs. *Roome,* 64 N. W. (Mich.), 193.

And upon the proposition that where a contract is illegal on account of involving the commission of a crime, the doctrines of estoppel, laches, ratification and the like are not applicable, see:

Colby vs. *Title Ins. & Trust Co.,* 160 Cal., 632;
Robinson vs. *Patterson,* 39 N. E. (Mich.), 21, 24;
Hardy vs. *Smith,* 136 Mass., 328;
Langan vs. *Sankey,* 7 N. W. (Iowa), 393;
Wheeler vs. *Wheeler,* 5 Lansing (N. Y.), 355;
Brown vs. *First National Bank,* 24 L. R. A., 206;
Standard vs. *Sampson,* 99 Pacific (Okla.), 796;
McCormick Harvesting Machine Co. vs. *Miller,* 74 N. W. (Neb.), 1061;
Brook vs. *Hook,* L. R. 6 Exch., 89;
Henry vs. *State Bank,* 107 N. W. (Ia.), 1034.

The upshot of the whole matter:

The upshot of the whole matter is that the complainant here, an independent corporation then under the control of that faithless fiduciary of the N. W. Co. whom the agent of the malcontent bondholders had privately interviewed and arranged a plan with, regardless of directors or stockholders,—an independent corporation which had never had any prior relations with the N. W. Co., which had never before or since purchased a bond or share of stock of the N. W. Co., and which was itself then in a financially depressed condition,—this independent corporation, then controlled by the faithless fiduciary who was himself combing the highways for money, at a special meeting of the puppets of the trust-betrayer, and as

the result of an antecedent agreement made with the malcontent bondholders of the other corporation, is made to obligate itself, without consideration, and without any corporate occasion or necessity to justify the sacrifice, for the bonds at par with accrued interest, of an abandoned enterprise,—bonds that it had no rational use for, bonds upon which it could not raise a dollar, bonds that no sane bank would accept as collateral, bonds that no trustee would dare invest trust funds in, bonds that were wholly powerless and inadequate to suppress adverse northern competition, bonds that could not be utilized for any honest business purpose.

And those who participated in and expect to profit by this scheme are here asking a court of justice to aid them to realize the fruits of the preconcerted plan between them an Dingee whereby in effect,—and there can be no masking it,—the Standard should be sacrificed as a holocaust for the delinquencies of Dingee and the disappointed expectations of these bondholders, in a totally different and disconnected corporation; and the central problem which presents itself for solution is whether, under all the facts and the reasonable inferences therefrom, this attitude of these bondholders, who care nothing for the Standard except as it may be a convenient instrument to enable them to recoup their losses elsewhere, is equitable or inequitable. Will that commercial morality be recognized in a court of justice which would permit the

Howard bondholders to reprobate Dingee's wrongful conduct towards the N. W. Co. which injures them, but approbate Dingee's equally wrongful conduct towards the Standard which benefits them? They complained, and were very swift and persistent in their complaints, against Dingee for his wrongdoing in the affairs of the N. W. Co.: but when that same faithless fiduciary betrays, with their antecedent knowledge and concurrence, a second corporation, to their and his advantage, a change falls upon the spirit of their selfish dream: what was wrong in the one case becomes the purest ethics in the other: what was a corporate wrong in the one case becomes a corporate blessing in the other: prominent among those principles of elevated morality which are supposed to form the essence of equity, we are to meet this, that it is equitable to run with the hare and hunt with the hounds, and that it matters nothing what wrong may be done the Standard, provided the unwelcome bonds are got rid of, and we get our money.

But: May an individual in control of two different corporations, of the first of which he was so unfaithful a trustee as to compel abandonment of the enterprise, be so wrought upon by its malcontent bondholders, and by his own consciousness of wrongdoing and the consequences thereof, that he becomes as faithless to the second as he was to the first? May such malcontent bondholders carry to a successful conclusion a scheme bottomed upon this very faithlessness, which

had their full knowledge and willing concurrence? Will a court of justice say nothing to that? Will a court of justice permit willing debauchers of corporate fiduciaries to profit by the very breach of duty which they have participated in bringing about? Is any court willing that the innocent should suffer so that the guilty may escape, and escape profitably? Will any preconcerted plan receive judicial approval which permits the wrongdoing of Dingee, and the consequent failure and abandonment of the N. W. Co. enterprise, and the consequences thereof, to be compensated by the sacrifice of the Standard,—the sacrifice of an innocent corporation to the personal purposes of interested parties, to Dingee's desire to get Evans off his back and secure personal immunity from unpleasant consequences including probable criminal prosecution, and to the inequitable greed of disappointed bondholders anxious to get rid of what they knew to be worthless bonds and to get their money back? Can it be possible that the transfer of Dingee's burdens to an independent corporation,—that the imposition upon an innocent corporation of the consequences of his antecedent and disconnected corporate treachery,—all done pursuant to a preconcerted arrangement made long before, without notice to or consultation with either directors or stockholders, and all done with the aid of confederating puppets and by a sham sale,—can it be possible that so gross a cor-

porate fraud as this can be rescued from judicial condemnation?

No common law judge, no chancellor who ever sat in an equity case, has ever approved the repulsive doctrine that it is legally right or equitable that the innocent should suffer: but how is it possible to make the suffering of the innocent any justification for a finding in favor of those who consciously and knowingly participated and concurred in bringing about that very suffering of the innocent of which we here complain and against which we here protest? Why should these Howard bondholders be willing to let this innocent Standard Corporation suffer, so that their bad investment in another company might be retrieved? Does not this very willingness demonstrate that they are utterly unworthy of the sacrifice? Surely, no common law judge, no chancellor, ever awarded recognition to a suitor who would consent that an innocent person should suffer for his mishaps or bad investments. What, indeed, would we think of a man who would allow another to die for a crime of which he knew him to be innocent? What would we think of an equitable principle which allowed the innocent to take the place of the guilty? Is it possible to vindicate any principle of law or of equity by inflicting punishment upon the innocent? Would not such procedure as that be a renewed violation of legal principles rather than a vindication of them?

No principle known to our jurisprudence calls for

a finding in favor of the wrong person: if a man violates legal principles, those principles demand *his* punishment, not that of a substitute; and, indeed, there can be no law, human or divine, that can be satisfied by the punishment of a substitute. There cannot be, nor is there, any principle of right which demands that the guilty be rewarded; and yet, to reward the guilty is far nearer justice than to punish the innocent.

Respectfully submitted.

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